Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HARRY MAYNARD,

Petitioner

v.

KEITH NYGREN, not individually but as Sheriff of McHenry County, Illinois,

Respondent

On Petition For Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the Seventh Circuit apply an inappropriate legal standard or test in affirming the sanction of dismissal for Maynard's alleged discovery violation?

2) In determining the existence and severity of the discovery violation and the appropriateness of dismissal with prejudice, was it error to find that the document allegedly withheld was relevant?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

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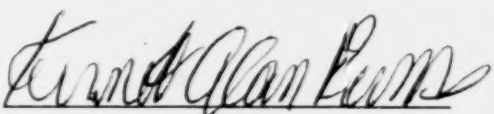

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BASIS FOR SUPREME COURT JURISDICTION

(1) The Seventh Circuit entered the opinion from which Maynard seeks certiorari on June 22, 2004.

(2) This Court is granted jurisdiction to hear this cause pursuant to 28 U.S.C. 1254(a), which grants this Court discretion to hear the case pursuant to a Petition for Writ of Certiorari.

STATUTES AND FEDERAL RULES INVOLVED IN THE CASE

The text of the following statutes and Federal Rules of Civil Procedure implicated in the case are reproduced in the Appendix which is bound and filed separately:

Americans with Disabilities Act, 42 U.S.C. 12101 et seq.
Federal Rule of Civil Procedure 37

STATEMENT OF THE CASE

Maynard was employed as a corrections officer for the McHenry County Sheriff's Department from January 9, 1992, until his termination by Defendant Nygren on September 15, 1997. While hospitalized in February, 1996 at the direction of his physician, Dr. David Martinez ("Dr. Martinez"), Maynard was diagnosed with Multiple Sclerosis ("MS"). On or about March 9, 1996, Maynard presented his supervisor with a March 4, 1996, report from Dr. Martinez allowing Maynard to return to work and advised the supervisor of the MS diagnosis. The supervisor, Chief Maire, advised Maynard that he would not be allowed to return to work because the letter stated that Maynard "could have recurrent episodes of weakness and unsteadiness." Appendix at A77.

After the meeting with Maire, Maynard had an in-person discussion with Dr. Martinez wherein he expressed displeasure about the content of the March 4, 1996, report.

Dr. Martinez testified that he advised Maynard that if Dr. Benjamin Nager (a neurologist) said that Maynard could return to work, Dr. Martinez would defer to the specialist's opinion. By contrast, Maynard testified that he did not recall Dr. Martinez making that statement. There was no in-person meeting Maynard and Dr. Martinez after March 7, 1996. While Maynard testified that he never spoke with Dr. Martinez after March 7, 1996, Dr. Martinez testified that he recalled speaking by phone with Maynard on or about April 4, 1996, at which time Maynard allegedly requested a modified report from Dr. Martinez. Dr. Martinez also stated that he could not be certain of whether the April, 1996, conversation occurred by phone or in person. He was certain that no in-person conversation had occurred in his office, and no notation was made on Maynard's chart. Later, Dr. Martinez testified that the conversation "to the best of his recollection" occurred at his office. Dr. Martinez confirmed that there was no notation in Maynard's chart that Maynard had requested a second letter.

On March 25, 1996, Dr. Martinez was sent a letter regarding Maynard by consulting neurologist Dr. Benjamin Nager ("Nager"). Appendix at A79. In relevant part, Dr. Nager declined at that time to release Maynard back to work without restrictions. Dr. Martinez testified that he received the Dr. Nager letter, but was unclear as to whether he received it around March 26, 1996 (before Dr. Martinez' second report) or after April 4, 1996 (the day of the second report). In the second report, Dr. Martinez made reference to Dr. Nager's conclusion that Maynard could not return to work. Maynard testified that he never received the Dr. Nager letter, and that Dr. Nager never discussed with Maynard that letter's contents.

On April 4, 1996, Dr. Martinez drafted a second report, the document that the Trial Court concluded Maynard had intentionally withheld and which provided the Court's justification for dismissing the case. Dr. Martinez stated in

the letter that Maynard was not presently able to perform the functions of his job, but that Dr. Martinez hoped Maynard would be able to return to work within ninety (90) days.

Jeanne Gannon, Dr. Martinez' secretary/receptionist, testified in Support of Defendant's Motion to Dismiss that she typed the April 4, 1996, letter at Dr. Martinez' direction, left it hanging in a wall "stacker" in an open area of the office for Maynard to pick up, and that the letter was apparently picked up. Gannon also testified that she did not witness Maynard request the letter and did not recall seeing Maynard pick up the letter. Gannon further testified that it was standard practice in Dr. Martinez' office for a patient's request for a release letter to be noted in a patient's chart, and that such documentation was absent from Maynard's chart.

On November 12, 1996, counsel for the Sheriff's Department wrote to Maynard on behalf of the Defendant and advised that as an alternative to releasing his medical records, Maynard could submit himself to examination by an Independent Medical Examiner (IME). In January, 1997, Maynard submitted himself to the IME, Dr. Pradip Sethi, pursuant to the letter of Mr. Harrison, then Special Assistant State's Attorney and subsequently counsel for Defendant. Dr. Sethi issued two reports regarding Maynard on January 14, 1997 and March 31, 1997, Appendix at A84-86, A87, stating that there was no guarantee that Maynard would be symptom-free or that Maynard could perform all job functions all of the time. Dr. Sethi stated that Maynard's "deficits [were] fairly mild" and that there were many aspects to Maynard's job that Maynard could perform safely. At no time did Dr. Sethi state that Maynard was physically incapable of performing his duties as a corrections officer.

Prior to August 6, 1997, Defendant advised Maynard that Maynard would be terminated on September 15, 1997. Maynard filed a charge of discrimination with the EEOC on August 6, 1997. Maynard's suit followed on June 25, 1998.

Defendant discovered in January, 2002, the existence of the second Dr. Martinez letter and moved for sanctions including dismissal, alleging that the defense had been prejudiced by the actions of Maynard in intentionally withholding the document. Dr. Martinez testified that when he reviewed the file in January, 2002, in preparation for his trial testimony, the copy of the April 4, 1996, report was in the file and the original of same was not in the file. But Dr. Martinez could not confirm that the copy of the letter was in the chart in 1999, either when Plaintiff's counsel requested the file in February, 1999, or when Dr. Martinez gave his deposition in June, 1999.

On February 14, 2002, after a two-day evidentiary hearing, the Trial Court granted the Motion, finding that (a) the April 4, 1996, Dr. Martinez report was a relevant document, and that the knowledge of said document might have influenced him to grant summary judgment on Plaintiff's discriminatory discharge claim on June 19, 2000; (b) Plaintiff was obligated to produce the document in discovery if he possessed it; (c) the knowledge of the document might have influenced Dr. Sethi's "ambiguous" opinion; (d) the testimony in support of the Motion was credible, leading the Judge to infer that Maynard received the letter; (e) Maynard had acted in bad faith and had lied in both his affidavit (supporting the memorandum in opposition to the Motion to Dismiss) and in the Amended Complaint; (f) dismissal, rather than a lesser sanction, was appropriate because the discovery violation was material and was discovered from a witness, not the Plaintiff; (g) were the Judge to give an instruction to the jury regarding the non-disclosure of the document, it would weaken an already "thin" Plaintiff's case; (h) he believed the letter was provided to Plaintiff's counsel, and that it was "more likely" that the letter was either lost in the office of Plaintiff's counsel or removed from said office by Maynard; (i) despite six affidavits provided by three attorneys, two paralegals and the

Plaintiff stating that the document had never been seen, "it doesn't mean that somebody else couldn't have gone through the file"; and (j) he didn't believe that Plaintiff's attorneys had intentionally withheld the document. The Court ordered the dismissal of the case, ordered Plaintiff and his counsel to each pay half of the award of attorney's fees (an amount subsequently quantified) and payment to the clerk of $3500 for 7 hours of the Court's time at $500 per hour.

Maynard and his counsel appealed the dismissal and the sanctions; the Seventh Circuit reversed the sanctions against counsel and remanded the case for further consideration of the appropriateness and severity of sanctions pursuant to a clear and convincing evidence standard. *Maynard v. Nygren,* 332 F.3d 462 (7th Cir. 2003). The Trial Court held a hearing on July 16, 2003, wherein it advised Plaintiff's counsel that if Plaintiff had not paid the previously imposed sanctions by the next court date, "that's going to impact significantly on [the Court's] decision on the issue of whether dismissal is a sanction." The Trial Court stated further that "[Maynard] better be prepared to have paid that if he's seeking to continue on with this suit."

On August 11, 2003, the Trial Court conducted a hearing wherein counsel for both sides argued as to whether the evidence adduced in February of 2002 constituted clear and convincing evidence of the discovery violation and whether dismissal was the appropriate sanction. The Court also heard testimony from Plaintiff Maynard as to his ability to pay monetary sanctions previously imposed by the Trial Court. During the July 16, 2003, hearing and in the August 11, 2003, hearing, the Trial Court stated that it believed that the monetary sanctions short of dismissal previously imposed on Maynard had not been addressed in Maynard's appeal brief and had not been reversed by this Court. The Trial Court then stated that it found that the willful discovery violations had been proven not only by clear and convincing evidence but proven "beyond a reasonable doubt." The Trial

Court then found that lesser sanctions than dismissal would not be appropriate in light of Maynard's "false pleadings", "contumacious behavior" and what the Court perceived as Maynard's failure and refusal to pay sanctions despite Maynard's ability to do so. At the conclusion of the hearing, the Trial Court issued the Order from which Maynard appealed to the Seventh Circuit.

The Seventh Circuit upheld the Trial Court without conducting oral argument. *Maynard v. Nygren*, 372 F.3d 890 (7th Cir. 2004), finding in relevant part that the Trial Court appropriately took into consideration Maynard's continued untruthfulness, the fact that Maynard had not begun to pay any of the sanctions previously assessed against him and the evidentiary weakness of Maynard's case. The Court of Appeals did not address several other issues raised by Maynard in his brief, including:

(a) whether dismissal was appropriate given that the second Martinez letter only restated the contents of the Nager letter (which had been turned over in discovery) and was significantly older than the reports of Dr. Sethi on which the Sheriff based the decision to terminate Maynard's employment; and

(b) whether the Trial Court had improperly taken into account the assets and income of Maynard's wife in determining that Maynard had the ability to pay the monetary sanctions which ~~had already been~~ assessed.

The Trial Court was vested with jurisdiction to hear Maynard's suit pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq and 28 U.S.C. §1331, federal question jurisdiction.

ARGUMENT IN SUPPORT OF ALLOWING WRIT OF CERTIORARI

Petitioner asks the Court to clarify for the Circuits the factors which must be considered and the weight which should be accorded to each before District Courts are empowered to dismiss a Plaintiff's case for a discovery violation under Federal Rule of Civil Procedure 37. Restated, how extreme must the sanctioned conduct be before the District Court is justified in "closing the Courthouse doors" to the Plaintiff? Certiorari is appropriate in this case because

a) A conflict exists among the Circuits as to the standards applicable to dismissal of a case as a Rule 37 sanction, Supreme Court Rule 10(a); and

b) The decision of the Seventh Circuit resolved an important question of federal law that has not been, but should be, settled by this Court or is at odds with the standards set forth for dismissal as a discovery sanction in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778 (1976). Supreme Court Rule 10(c).

Treatment of Rule 37 Dismissal in Courts of Appeals

The vast majority of cases in the Courts of Appeals which have addressed dismissal as a discovery sanction have done so in the context of violated discovery orders, FRCP 37(b), or in the context of a party failing to appear for his or her own deposition, FRCP 37(d). The most notable exception is the case at bar wherein Petitioner's case was dismissed for an alleged failure to disclose one document in discovery, implicating FRCP 37(c). The factors most often discussed by the various Circuits in either affirming or reversing a Rule 37 dismissal are:

1) The District Court's inherent powers or obligations to control its docket or enforce compliance with the judicial

process. *Young v. Gordon*, 330 F.3d 76, 81 (1st. Cir. 2003), E*dgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977), *Bonds v. District of Columbia*, 93 F.3d 801,808 (D.C. Cir. 1996);

2) The requirement that the sanctioned conduct be "extreme" or "flagrant" as required by *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778 (1976). *Young* at 81, *Bonds* at 808, *Poulis v State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3rd Cir. 1984), *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) (cites to 2nd, 5th and 11th Circuits omitted);

3) Disobedience of prior court discovery orders as contemplated by FRCP 37(b). *Young* at 81;

4) Proportionality of the punishment to the conduct being sanctioned and/or "justness". *Dunbar v. U.S.*, 502 F.2d 506, 509 (5th Cir. 1974), *Allen v. CTA*, 317 F.3d 696, 703 (7th Cir. 2003), *Maynard v. Nygren*, 372 F.3d 890, 892 (7th Cir. 2004), *Young* at 81, *Edgar* at 772, *Ehrenhaus* at 920, *Bonds* at 807;

5) The degree of prejudice caused to the adverse party by the sanctioned conduct. *Anderson v. Foundation for Advancement, Education and Employment of American Indians*, 155 F.3d 500, 504 (4th Cir. 1998), *Mutual Federal Savings v. Richards & Assoc., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989), *U.S. v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002);

6) The policy of deciding cases on the merits. *Young* at 81, *Mutual Federal Savings* at 92, *Dunbar* at 509, *Edgar* at 772, *Martin v. DaimlerChrysler*, 251 F.3d 691, 694 (8th Cir. 2001), *Ehrenhaus* at 920, *Bonds* at 808;

7) Whether a Trial Court warned the Plaintiff that the conduct could result in dismissal. *Valentine v. Museum of Modern Art*, 29 F.3d 47, 50 (2d. Cir. 1994), *U.S. v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002), *Ehrenhaus* at 921, *Bonds* at 808;

8) Deterrence to others who would abuse the discovery process as stated in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778 (1976)

(majority of Circuits);

9) Presence of willfulness, bad faith or fault on behalf of the sanctioned party as stated in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778 (1976) (majority of Circuits);

10) The extent of the sanctioned party's responsibility for the sanctioned conduct (as contrasted with the culpability of their counsel). *Poulis* at 868, *Ehrenhaus* at 921;

11) The history of the sanctioned party's dilatory conduct or the presence of a pattern of deceit. *Poulis* at 868, *Martin* at 694, *Ehrenhaus* at 921;

12) Whether the Trial Court considered the efficacy of sanctions less severe than dismissal and whether lesser sanctions previously imposed had been effective. *Poulis* at 868, *Anderson* at 504, *Mutual Federal Savings* at 92, *Reyes* at 458, *Edgar* at 772, *Ehrenhaus* at 920, *Wouters v. Martin County*, 9 F.3d 924, 934 (11th Cir. 1993), *cert. denied* 513 U.S. 812, 115 S.Ct. 65 (1994);

13) The meritoriousness of the sanctioned party's claim or defense, in part as a measure of the harshness of the sanction of dismissal. *Poulis* at 868, *Maynard* at 893, *Bonds* at 808;

14) Whether the dismissal would be a denial of due process. *Dunbar* at 509, *G-K Properties v. Redevelopment. Agency of City of San Jose*, 577 F.2d 645, 648 (9th Cir. 1978);

15) The relevance of the subject matter of the discovery violation as a measure of the prejudice to the adverse party. *Dunbar* at 509-510, *Savola v. Webster*, 644 F.2d 743, 746 (8th Cir. 1981), *Ehrenhaus* at 920;

16) The continued untruthfulness of the party being sanctioned. *Allen v. CTA*, 317 F.3d 696, 703 (7th Cir. 2003), *Maynard v. Nygren*, 372 F.3d 890, 893 (7th Cir. 2004); and

17) The failure of the sanctioned party to pay previously ordered monetary sanctions. *Maynard v. Nygren*, 372 F.3d 890, 893 (7th Cir. 2004).

This Court should provide a uniform approach to the Circuits for when Rule 37 dismissal is appropriate.

The Circuits vary dramatically on the method to analyze whether a Rule 37 dismissal should be affirmed or reversed. None of the factors listed have been specifically applied by all Circuits while the last two factors listed have been invoked only by the Seventh Circuit. Only three Circuits have squarely held that dismissal is inappropriate where the discovery material at issue is not relevant to the proceedings. *Dunbar v. U.S.*, 502 F.2d 506, 510 (5th Cir. 1974) at FN2 (stating that "the less relevant ... information becomes, the less appropriate a Rule 37 sanction is, where there is failure or refusal to produce the information").

Petitioner acknowledges as he must that Rule 37(c) allows in extreme cases for the imposition of penalties listed in FRCP 37(b)(2)(A-C), including dismissal. The Circuits agree that dismissal pursuant to Rule 37 is to be reviewed for abuse of discretion and that there is no "bright-line rule" as to when dismissal must be overruled. Under the present various methods of analysis, some Circuits, including the Seventh Circuit, are allowing dismissals to stand on fact patterns that are not "extreme" in the meaning contemplated by *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778 (1976), and as a result those Circuits are moving away from the policy that favors trying cases on their merits. *Dunbar v. U.S.*, 502 F.2d 506, 509 (5th Cir. 1974). Petitioner is therefore asking this Honorable Court to provide guidance to the Circuits as to "where the bar should be set" which will justify dismissal under Rule 37.

The degree to which Petitioner has been prejudiced by the Seventh Circuit's analysis of when Rule 37 dismissal is appropriate will be addressed below.

Petitioner's case was dismissed for failure to disclose one document which was arguably irrelevant to the case.

Petitioner does not ask this Court to examine whether the Trial Court or the Seventh Circuit erred in their findings of fact with regard to whether he failed to disclose the Letter of Dr. David Martinez dated April 4, 1996. Instead, Petitioner pleads to this Court that even assuming *arguendo* the factual findings were correct, the failure to produce that particular document could not properly form the basis for dismissal because the document was not relevant and thus the prejudice to the Respondent was minimal to non-existent.

Harry Maynard, the Petitioner, was a corrections officer for the McHenry County Sheriff in February of 1996 when he was diagnosed with Multiple Sclerosis (MS). The County was advised of the diagnosis no later than March 4, 1996, by letter from Dr. Martinez. Maynard was then seen by a neurologist, Dr. Nager, who produced a report dated March 25, 1996. It is undisputed that these two letters, both produced in the appendix, were produced to the Respondent in discovery. The Nager letter advised that Maynard was not ready to go back to work and that the Doctor hoped Maynard's condition would improve within a month. The second Dr. Martinez letter, dated April 4, 1996, and also reproduced in the Appendix, echoed the Dr. Nager letter and stated that Dr. Martinez hoped Maynard would be able to return to work within ninety days.

It is undisputed that Maynard did not return to work within ninety days and that at the request and direction of Respondent's counsel, Maynard underwent an Independent Medical Evaluation with Dr. Sethi in early 1997. The letters of Respondent's counsel dated November 12, 1996, and Dr. Sethi, dated January 14, 1997, and March 31, 1997 are also included in the Appendix. It is undisputed that Maynard was terminated on September 15, 1997, and that Respondent asserted that in terminating said employment, Respondent relied on the reports of Dr. Sethi. It is further undisputed that

the termination of Maynard occurred seventeen months after the date of the second Dr. Martinez letter and that the last report of Maynard's fitness for duty was written by Dr. Sethi.

Respondent moved for Rule 37 sanctions including dismissal less than two weeks before trial, asserting that it had been prejudiced by Maynard's failure or refusal to produce in discovery the one-page Dr. Martinez letter dated April 4, 1996. Respondent argued that had it been in possession of that letter at the time it moved for Summary Judgment in 2000, the Court would have granted Summary Judgment on the portion of the suit the Court allowed to stand. Maynard argued that he had no knowledge of the document and that in any event the document was not relevant because Maynard was not terminated until seventeen months later. A two-day evidentiary hearing followed wherein Dr. Martinez and two of his staff testified that the second letter had been prepared at Maynard's request and left for him to pick up.

The Trial Court found that the document was relevant and that Petitioner had intentionally withheld it. In relevant part, the Trial Court ordered dismissal and monetary sanctions against Maynard. Maynard appealed and on June 10, 2003, the Seventh Circuit remanded to the Trial Court for a hearing to be conducted pursuant to the clear and convincing evidence standard adopted in *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003). On August 11, 2003, the Trial Court held a hearing and reaffirmed the sanctions against Maynard, finding that the allegations of misconduct had been proven not only by clear and convincing evidence but "beyond a reasonable doubt". The Trial Court further relied upon the fact that Maynard had continued in testimony and affidavits to deny knowledge of the existence of second Dr. Martinez letter and that Maynard had not begun to pay the sanctions previously entered (which exceeded $20,000) in the two months since the case had been remanded. The Trial Court also found that had he been aware of the second Dr.

Martinez letter in 2000, the Court likely would have granted Summary Judgment on all counts. Notably, the Trial Court had allowed the remainder of the case to survive Summary Judgment in 2000, finding that the later reports of Dr. Sethi created an issue of fact precluding Summary Judgment..

The Trial Court's decision and the Seventh Circuit's affirmance contravenes the spirit and letter of *National Hockey League.*

Petitioner argues that Certiorari is also appropriate in that the Seventh Circuit's opinion upholding the dismissal is at odds with the letter and spirit of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778 (1976). This argument is based on an observation drawn from an extensive review of case law regarding Rule 37 dismissals; in no other case the Counsel has been able to find at any level of the Federal Court system has a Plaintiff been denied his day in Court based on the failure or refusal to produce one one-page document. Dismissals have derived from failure to follow court orders (usually multiple times), a pattern of discovery abuse or delay, a history of dilatory conduct, or failure repeatedly to attend one's deposition, but the minimum of misconduct attributed to Maynard which precipitated his ejection from the Courthouse is without compare to hundreds of relevant Federal cases involving this issue.

The Trial Court attributed the dismissal in part to Maynard continuing to lie about withholding the document. But the Trial Court's expectation was a classic double-bind in that Maynard could either deny he knew about the document as he had from the beginning or tell the Court he had been lying to it for years. Either way, dismissal was the only option the Trial Court seriously considered. But the Seventh

Circuit itself has disavowed a rule that dismissal is required for any false testimony. *Allen v. CTA*, 317 F.3d 696, 702-703 (7th Cir. 2003). The requirement the Trial Court imposed was also comparable to the classic question "when did you stop beating your wife?"; no allowance was made for the possibility that Maynard's continuing denial was truthful.

Similarly troubling was the Trial Court's rationale that Maynard could not be allowed to proceed unless he had made arrangements to pay the monetary sanctions already imposed. The effect of this requirement, given the imprimatur of the Seventh Circuit, is to create a double-standard whereby litigants of greater means can commit misconduct and still have their day in Court but where litigants of lesser means commit one violation and the Courthouse door is slammed at their back.

The strongest argument that dismissal was inappropriate was that the document at issue was not relevant and therefore Respondent was not prejudiced. As previously noted, the opinion of Dr. Martinez was superseded by two letters from Dr. Sethi nine and eleven months later, and the opinions expressed by Dr. Martinez in the second letter had already been expressed by the neurologist Dr. Nager ten days earlier in a letter that was produced in a timely manner. The document allegedly withheld was not relevant because the determination of whether an employee is qualified under the ADA is made at the time of the employment decision. Maynard was not fired for another seventeen months. *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599,603 (7th Cir. 1999). See also *Dunbar v. U.S.*, 502 F.2d 506, 509 (5th Cir. 1974) (dismissal set aside because information Respondent sought was not relevant to the case at bar).

The Trial Court and Seventh Circuit's final factor in the analysis supporting the Dismissal was that Maynard's case was too weak to withstand trial. Assuming the Seventh

Circuit was referencing the evidentiary impact of the second Dr. Martinez letter, it was erroneous as a matter of law because that letter was no more or less relevant than the letter of Dr. Nager which voiced the same opinion seventeen months before Maynard was fired. If the Dr. Sethi letters created an issue of fact in 2000 which precluded Summary Judgment, it stands to reason that the same issue of fact existed in 2002, with or without the existence of the second Dr. Martinez letter. *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599,603 (7th Cir. 1999).

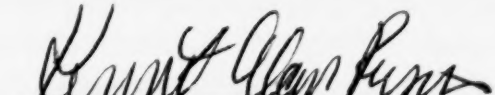
This case does not present the extreme sort of abuse or disrespect for the system that was contemplated in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778 (1976). What this case presents, even taking the facts in the light most favorable to Respondent, is years of substantial discovery compliance where the withholding of one document and the failure to pay sanctions within sixty days of remand were used to justify denying Maynard a day in Court.

CONCLUSION

It is axiomatic that Courts need to control their dockets and litigants must participate in good faith in the judicial process. By the same token, litigants are entitled to have their day in court except in the most extreme and egregious situations. Fundamental fairness requires that a Trial Court should not close the Courthouse doors in response to one minor discovery infraction.

The story of how Petitioner was denied his day in Court is without compare in the Federal Court annals and must not be allowed to stand. This Court should provide guidance to the Circuits with regard to the application of Rule 37 so that Petitioner's situation will not be repeated elsewhere.

WHEREFORE Petitioner Harry L. Maynard prays that this Honorable Court grant a Writ of Certiorari to the Court of Appeals for the Seventh Circuit in this matter to address the questions presented herein and for such and other relief as this Honorable Court deems equitable and just in all of the circumstances.



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No.

IN THE

Supreme Court of the United States

HARRY MAYNARD,

Petitioner

v.

KEITH NYGREN, not individually but as Sheriff of McHenry County, Illinois,

Respondent

On Petition For Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

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United States District Court, Northern District of Illinois

Name of Assigned Judge Phillip G. Reinhard
CASE NUMBER 98 C 50193
DATE 8/11/2003
CASE TITLE MAYNARD vs. NYGREN

DOCKET ENTRY

(10) [Other docket entry] This case came before the court on remand. The court, after hearing argument and testimony from the plaintiff, and reviewing the transcript of the prior hearing in this matter, and documents in the court file, finds, by clear and convincing evidence, for the reasons stated on the record in open court, that plaintiff willfully violated the court's discovery rules and that the appropriate sanction, after considering the potential alternatives, is dismissal of plaintiff's case with prejudice. This cased is dismissed in its entirety with prejudice. Monetary sanctions previously imposed on plaintiff remain in effect.

s/Philip G. Reinhard

UNITED STATES DICTRICT COURT
Northern District of Illinois
Western Division

Harry L. Maynard JUDGMENT IN A CIVIL CASE

v. Case Number: 98C50193

Keith Nygren

IT IS HEREBY ORDERED AND ADJUDGED that this case came before the court on remand. The court, after hearing argument and testimony from the plaintiff, and reviewing the transcript of the prior hearing in this matter, and documents in the court file, finds, by clear and convincing evidence, for the reasons stated on the record in open court, that plaintiff wilfully violated the court's discovery rules and that the appropriate sanction, after considering the potential alternatives is dismissal of plaintiff's case with prejudice. This case is dismissed in its entirety with prejudice, Monetary sanctions previously imposed on plaintiff remain in effect.

Michael W. Dobbins, Clerk of Court

Date: 8/11/2003

Susan M. Wessman, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

HARRY L. MAYNARD, Docket No. 98 C 50193

Plaintiff,

Rockford, Illinois
Monday, August 11, 2003
9:00 o'clock a.m.

v.

COUNTY OF MC HENRY, et al.

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES:

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MR. JAMES T. HARRISON

Court Reporter: Stacey A. Collins
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THE COURT: All right. I'll take a brief recess and then be prepared to make a finding.

MR. RUNES: Thank you, Judge.

(A recess was had.)

THE COURT: All right. I've taken a brief recess and I'm prepared to make my findings based upon the arguments that have been made today and based upon the proofs that were submitted to me back at the time I made my original decision and I've considered the arguments and testimony that I've heard today.

As to Rule 37 sanctions of dismissal, I want to -- first, I want to indicate that I am considering the lesser sanctions that I've read in the case law and also those that are in Rule 37(b)(2)(a) and (b) as to whether they would be appropriate and to set forth in a more detailed way whether lesser sanctions can be imposed less than dismissal. I want to indicate that I would agree that a dismissal is, under case law as

cited not only in this case but in other cases that I considered at the time of my original decision, that that is a draconian sanction and that you should look at the facts and circumstances of each case and that dismissal of a lawsuit is one that should only be imposed if there is no other sanction and that I should consider not just as to the merits of his case, which I'm going to consider, but also what prejudice may be involved as far as the defendant is concerned and I should consider as well what are the alternatives and why the alternatives may or may not be applicable for this violation in this case.

Also, Counsel has cited whether this is an isolated incident or whether there is a clear record of continuous contumacious conduct and I've considered the cases that are cited in this -- the opinion of the Circuit Court of Appeal.

Now, I'm applying the clear and convincing standard as to plaintiff's willfulness in violating Rule 37 and the first thing I want to point out is that there has been -- the plaintiff seeks to continue on with his lawsuit. I have imposed a sanction of attorney's fees and those attorney's fees that were incurred just for the discovery violation by -- and they were incurred by the defendant, were $33,442.

There were nontaxable expenses of $1543 and there was the $3500 sanction imposed for the Court's time. I imposed half of that on the plaintiff, so he would -- he would -- it would be somewhere around $20,000 that he would have to pay. He has to this date not paid one cent of that and -- nor has he offered to pay one cent of that.

The court will consider that because it is to the prejudice of the defendant to continue this lawsuit when someone has just said I haven't got the money to pay it and, therefore, I'm not going to pay it, but I want to be able to pursue my cause of action in court. I think that that -- under the facts here, that these sanctions remain unpaid and there has been no offer to show that he would pay it on time or anything like that. He simply said I can't pay it.

Yet I've heard testimony today that he is employed and expects to be employed for the rest of his life. He's making more money now -- and this is in the record, he's making more money now than he was making when he was a deputy sheriff and that he was making more money when he began his work as a truck driver and left the sheriff's office than he was making. He is making about 22 or $23,000 in income and he also receives unemployment benefits from the time he is off

work.

His wife works and has a steady job. They - - there has been no indication of what his debts are and there is no indication of unusual expenses. He has three vehicles, two that are maybe six or seven years old, but they are significant vehicles in terms of the cost and we don't -- he said he still owes on them. I don't know how much he owes on them. He has never gone to the defendant and said, look, let's work out a -- I'll work out a plan to pay you. Instead he said, well, I think I have access to the courts.

Well, I think that I can consider that as a factor in this case. One who seeks the enforcement of his rights in court who has been found to have willfully violated the Court's order I think has an obligation. I can cite related cases from the Seventh Circuit where the Seventh Circuit has found that a claim was pursued on appeal and it was frivolous and yet he -- the same claimant sought to go forward with other claims before the Court of Appeals. They said that until he has paid off the sanctions for his frivolous claims, he cannot proceed any further in the courts. And I'm citing Support Systems versus Mack, 43 F.3d 185, and the Verdone case 73 F.3d 669.

I only say that they are related. I don't say

they are direct authority, but I certainly feel that somebody who has sanctions for this type of willful violation who has the apparent means to pay either on a plan or some other way has said, no, I'm not going to make any effort to pay off my sanctions and, by the way, the testimony here today of course was subject to cross-examination, but it was not subject to any discovery, so that was somewhat limited.

Secondly, as a factor in determining a lesser sanction, not only has the -- did the defendant in this case -- or did the plaintiff in this case fail to disclose the April 4 doctor's report, he also failed to -- he said he never asked the doctor for a report, which, as I've previously said, I think that's a complete fabrication. The doctor isn't going to fabricate this. He did. And not only did he do that, but he has continued his untruthfulness in his pleadings by filing a false amended complaint as stated by Mr. Harrison, but he also testified before me and said I never asked for the report and never -- so I never got the report. That's contumacious, continuous behavior and yet he's asking me that he ought to be able to go forward in this lawsuit. I consider that as a factor in determining whether someone like that ought to be able to proceed.

As to the lesser alternatives, I did discuss those in my original decision, perhaps not as thoroughly as the Appellate Court suggested, and, therefore, I will make more determinations. I will incorporate those findings that I made as to both the materiality or relevance. I thought that April 4 document was relevant and was material. I will explain it a little further, but I'll also explain some of the options, lesser options, that I should consider, but I do want to reiterate and quote from what I said back at the first hearing and I quote: "Now, as to the sanction, the Court has considered alternative sanctions in Rule 37(b)(2) short of dismissal; however, the most severe sanction, dismissal, is warranted for the following reasons: Defendant's awareness of this violation occurred shortly before trial. Defendant's awareness of the discovery violation came not from plaintiff, but through a potential witness. The discovery violation is material and prejudicial to the defendant. The violation is willful in bad faith on the part of the plaintiff who is a party to the suit. The plaintiff continues to deny his willful failure to turn over the report in discovery and has compounded that by untruthful testimony under oath and in his affidavit.

"The plaintiff's case even without this evidence favorable to the defendant was weak and just barely survived summary judgment and might not have survived summary judgment. If I imposed lesser sanctions, the instructions that I would give the jury about the willful failure to disclose this report would further weaken your case. And as I look at the case -- and the only viable claim really is for pension benefits. The rest of the case you have earned more money on wages and you have withdrawn your request for wages. You have drawn more money from wages from your new job and the lawyers informed me at settlement that each side has spent -- I think it's over -- my recollection it's a hundred and thirty some thousand dollars of attorneys' fees. That's outrageous to have billed out in this case and I'm not going to let this go any further. To impose sanctions other than dismissal would not be just to the defendant."

In elaboration on what I just said as to lesser sanctions, I will first consider the fact that when was this violation brought to my attention? This case was set for trial. It was brought on the eve of trial , I think it was within two weeks of the date of when the trial was to begin and then I had to postpone that trial which was set. We had a long hearing with

witnesses to come in and testify. So just the lateness of it I think is a factor of prejudice to the defendant in this case. They not only had to prepare for trial but then they had to switch gears and prepare for this hearing on the violation which I eventually sanctioned the plaintiff for and it's doubtful whether they will ever be able to collect much, but that's up to them to do it. I think the plaintiff has the means, he just doesn't have the will, to pay the sanction and I encourage plaintiff to go after -- or defendant to go after him to get some payment on the sanctions, but they will never recover the trial time that they spent in preparation for trial and then to have it postponed. That is a serious factor and it shows prejudice. And again shows the willfulness of this and, as I say, compounded by his untruthful testimony under oath and in his affidavit.

Looking at the lesser sanctions than dismissal, I have to go back and look at the nature of the case. And the nature of the case is an ADA case and there were a number of doctors' reports. I have reread my motion on summary judgment that I decided a number of issues adversely to the plaintiff, but the one issue that remained in the case was the issue of whether he was -- had a qualified disability and the --

on page 11. I reviewed that.

I can recall as I sit here now struggling whether I should grant summary judgment or not and that was because we had a number of doctors, Dr. Sethi being the final one, and all giving sort of equivocal answers as to his MS and whether -- most of them said, well, he can't work now, but he might be able to work in the future and we're not sure whether -- in his work whether he could have a seizure, we can't tell. It was all equivocal.

And, in my opinion, had I had the report of -- the second report of Dr. Martinez, that would have again said he is not ready for work now. In addition to that, there is no question that -- the sheriff and Maynard were not at odds other -- they liked him. He liked his work there. They were continuing things so that hopefully he would be able to come back to work, but at some point they reached a decision that there was no medical evidence that he could safely come back in that type of job and they had to make a decision. So there is talk about delays in them making the decision. It was all made to benefit Mr. Maynard. And had the other report been before me, the second report of Martinez, and -- that would have affected me. I may have said this is just another indication that it's - -

that the plaintiff is not qualified to work at that time, but also Dr. Sethi, who I cite in my opinion, felt there might be a sufficient warning that an exacerbation could occur. He didn't have the benefit of Dr. Martinez, a treating physician's report. Had he had that, there might have been -- it might have caused Dr. Sethi some more doubt as to whether he could qualify.

It was a close case on summary judgment, but this would have meant the difference in summary judgment. The case would have gone no further a long time ago and would have saved a lot of attorney's fees for the defendant. And I know the defendant filed a motion for me to reconsider my decision on summary judgment based upon some legal issues. Had I had this report, it would have made a difference.

In addition to that, let's say it somehow survived summary judgment. Then is there a lesser sanction? Well, let's first of all look at the strength of the case. First of all, even if it survived, I think it was a weak case. It didn't have good medical testimony on the part of the plaintiff, but, in addition to that, the damages in this case were minimal. He is -- really the wages, he is making more wages in his other job that he had and continues to

have. Secondly, he is -- only has a claim for pension benefits and pension benefits cannot be that great in this case. I have told both sides that they have way over-lawyered this case, not on this issue of the sanction, but on the amount of time that the plaintiff has put in on this case -- his attorneys and the amount of time that the defense has. It's -- at that time, it was a -- each side told me it was over I think $130,000 that each have put in for this minimal claim.

And as to any -- so the prejudice is there as to this defendant. Defendant has had to pay out in attorney's fees far, far more than it would ever have paid as far as the claim is concerned. In addition, the Court has thought about a lesser sanction, that is, obviously I could allow the defendant to use this report, but in -- and I could tell the jury, and I would tell the jury, that this has been willfully withheld. The defendant would be entitled to such an instruction I believe under the case law where there's been a willful violation of discovery. And it would probably -- if there's been a false pleading, which I find there is, that could be introduced against the defendant - - or against the plaintiff in this trial and it may be -- and I'm not sure of this, but if he has lied before -- if I have found that he's been

untruthful before this court in saying that he has never turned over -- or asked for these reports, and he would testify that he never asked for the report at trial, my finding may be admissible. I'm not sure.

But all of these factors go then to if I -- if his case is so diluted by what -- by his own conduct and the strength of his case is not there, then -- and the sanctions, these lesser sanctions, that I could impose would so dilute his case that -- and cause -- he wouldn't win, and he would, therefore, cause a great deal of prejudice to the defendant who's required to defend on such a weak case and in view of his contumacious behavior. Therefore, I have considered what other sanctions -- lesser sanctions could be imposed. I don't think that would rectify the serious false pleading, false testimony and weak case that is already here and for these and all the other reasons that I've stated, I think that the defendant is severely prejudiced.

Were this case to go forward with some sort of lesser sanction, I would think that defense counsel would probably want to take Dr. Sethi's deposition again to see whether the April 4th report would have impacted his opinion. Again, that would cause additional expense to the defendant and -- which

plaintiff should pay, but he now says he's unwilling to do so and can't pay. Plaintiff has really not suggested what these lesser sanctions would be to aid this Court. The defendant still -- plaintiff still persists in his untruthful position and for all these reasons, and I'll adopt also the reasons that Mr. Harrison stated as to some of the facts, there is no lesser sanction than dismissal and that's my order.

This is -- the transcript will stand for my findings and - - so that it will be final and appealable.

Mr. Maynard, you come in, you make a presentable witness. Some people make a mistake in life and I think you made a mistake. You've compounded that, and I have no doubt in my mind, just so that you know, that I believe you asked for that report and you got it, didn't like it and maybe in your own mind you've rationalized this in some way or you want to save face, whatever it is, but I have no doubt beyond a reasonable doubt that your conduct was what I found.

Mister -- Any questions any further by either side as to how to proceed? This is a final order, the case is dismissed. All those sanctions remain in place.

MR. RUNES: If I may, judge, I do have one

question. Earlier you stated that you were reincorporating your findings, I think it was from 139 to 151 of the transcript. I believe that in that portion of the transcript, there were sanctions imposed against Counsel.

THE COURT: I'm reincorporating those as they apply to the issues before me now. Obviously I -- Mr. Favaro and Miss Jochum are not a part -- they were found the sanctions were not appropriate under the standard of proof that I had addressed as far as they are concerned. I tried to touch on that, but, you're right.

MR. RUNES: The only other point that I would make, and just to clarify the record for our own benefit, is I don't believe that Mr. Maynard refused to pay. I think he testified today that he was unable to pay. I don't think he had testified as to whether he would be willing to make a payment plan. I think he would say that he was, but at this moment –

THE COURT: It's too late now. There's been no plan offered at any time to pay. You've stated that he is unable to pay.

MR. RUNES: That's right, Judge.

THE COURT: And I disagree under the evidence that I've heard and I don't think it's appropriate now

when he's not under oath to say, well, maybe he will pay under some plan. There was none suggested. I think he could pay and that's where we are.

MR. RUNES: Thank you, Judge.

THE COURT: That's all.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

--

Stacey A. Collins
Certified shorthand Reporter

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-3436

HARRY L. MAYNARD,

Plaintiff-Appellant,

v.

KEITH NYGREN, not individually but as Sheriff of McHenry County, Illinois,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 98-CV-50193—**Philip G. Reinhard**, *Judge.*

SUBMITTED APRIL 14, 2004*—DECIDED JUNE 22, 2004

Before BAUER, CUDAHY and COFFEY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This is a successive appeal. In 1998, Harry L. Maynard brought suit against his employer, Sheriff Keith Nygren, for an alleged violation of the Americans with Disabilities Act (ADA), 42 U.S.C.

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

§§ 12101-12213. Learning of discovery violations shortly before trial, the district court granted the defendant Sheriff's motion to dismiss and assessed monetary sanctions (in the form of an award to the Sheriff of attorney's fees incurred in bringing the successful motion for dismissal and a $3,500 fine for the court's time) against Maynard and his counsel. In *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003) ("*Maynard I*"), we determined, as a matter of first impression, that "considering the severe and punitive nature of dismissal as a discovery sanction, a court must have clear and convincing evidence of willfulness, bad faith or fault before dismissing a case." *Id.* at 468. Since the district judge had not specified whether his determination was based on the clear and convincing standard or a preponderance standard, we remanded for a reconsideration of the evidence in light of the standard we announced. *Id.* at 469. We asked the district court, on remand, to more fully articulate the rationale for not imposing a sanction short of dismissal. *Id.* at 469 n.4. We also reversed the sanctions levied against Maynard's counsel as unauthorized, given the circumstances.

On remand, the district court found by clear and convincing evidence that Maynard had "wilfully violated the court's discovery rules and that the appropriate sanction, after considering the potential alternatives, is dismissal of plaintiff's case with prejudice." (SA at 19.[1]) Maynard appeals both of these determinations and argues that the district judge should be recused from any further proceedings. Maynard does not appeal the district court's reaffirmation of the monetary sanctions previously imposed against him, *id.*, though he does argue that his failure to pay them prior to the remand hearing should not have

[1] References to the Short Appendix attached to Appellant's Brief will be designated by "SA at __."

been used by the district court as a rationale for dismissal of his suit. Because the district court did not err in finding (according to a clear and convincing evidence standard) that Maynard had willfully violated the court's discovery rules or that dismissal was appropriate, we affirm the dismissal of Maynard's suit.

I. WILLFULNESS

Although discovery sanctions, including dismissal, are reviewed for an abuse of discretion,we review the district court's factual findings for clear error. *Dotson v. Bravo*, 321 F.3d 663, 666-67 (7th Cir. 2003). Willfulness is, of course, a factual determination. *See Everyday Learning Corp. v. Larson*, 242 F.3d 815, 817-18 (8th Cir. 2001). "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

The district court found that the evidence and testimony clearly and convincingly supported a finding that Maynard had picked up the April 4 letter from Dr. David Martinez's office. (SA at 36-37.) Although the document had also been copied by Dr. Martinez's office as part of its small file on Maynard and sent to Maynard's trial counsel's office, it was not turned over to opposing counsel by either Maynard or his counsel. (SA at 37.) The district judge reviewed in detail his factual and credibility findings concerning the evidence surrounding this document and concluded that Maynard was "untruthful when [he] said [he] neither requested or got the letter." (SA at 39.) The district judge found by clear and convincing evidence that Maynard had intentionally and willfully withheld the April 4 letter from opposing counsel. (SA at 39-40.)

Maynard is basically arguing that circumstantial evidence cannot be clear and convincing evidence. But this is not a motion for summary judgment, and the existence of "factual disputes" given the circumstantial nature of the evidence does not prevent the district judge from validly finding by clear and convincing evidence that Maynard's discovery violation was willful. *Cf. United States v. Klausner*, 80 F.3d 55, 63 (2d Cir. 1996) ("Willfulness may be inferred from circumstantial evidence."); *United States v. Grumka*, 728 F.2d 794, 797 (6th Cir. 1984) ("[A] conviction may be sustained even when proof of willfulness is entirely circumstantial."). We have already noted in *Maynard I* that "the evidence does appear to support the Sheriff's positions and the district court's conclusions quite strongly," *Maynard I*, 332 F.3d at 469, and the inferences and credibility findings made by Judge Reinhard seem reasonable and are supported by the evidence he cites in the record. Thus, the district judge's finding by clear and convincing evidence that Maynard had willfully violated discovery rules was not clearly erroneous.

II. APPROPRIATENESS OF DISMISSAL

Discovery sanctions are reviewed for an abuse of discretion. *Maynard I*, 332 F.3d at 467. "Of all possible sanctions, dismissal is considered 'draconian,' and we must be 'vigilant' in our review." *Id.*, quoting *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223-24 (7th Cir. 1992). The sanction of dismissal must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction. *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998). Our review is not akin to a rubber stamp, *Dunphy v. McKee*, 134 F.3d 1297, 1300 (7th Cir. 1998), but "[w]e cannot understate the difficulty of the task litigants face when challenging a district court's choice of sanctions. They must convince us

that the district court abused its discretion in sanctioning them—a burden which is met only when it is clear that no reasonable person would agree with the trial court's assessment of what sanctions are appropriate." *Marrocco*, 966 F.2d at 223. An abuse of discretion is found where the decision of the trial court strikes us as "fundamentally wrong," *Anderson v. United Parcel Service*, 915 F.2d 313, 315 (7th Cir. 1990), or is "clearly unreasonable, arbitrary, or fanciful." *Beil v. Lakewood Eng'g and Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994).

Maynard challenges the district court's determination that dismissal of his suit was the only appropriate sanction given the circumstances. The district judge found that the defendant was prejudiced by the lateness of the disclosure and would be further prejudiced if required to defend "such a weak case." (SA at 49-50, 54-55.) Three factors apparently played into the district court's determination that a lesser sanction would not be appopriate: (1) Maynard's continued untruthfulness (SA at 47-48); (2) Maynard's failure to pay any portion of the monetary sanctions imposed against him (or even to offer to pay them on an installment plan) due to a claimed (but not well-supported) inability to pay, which operated to the defendant's prejudice if the lawsuit were allowed to continue (SA at 45-47, 50, 56-57); and (3) the evidentiary weakness of Maynard's case, which might not have survived summary judgment had he turned over the April 4 letter and which was further weakened by the discovery violation and his untruthfulness, together with the minimal damages he could claim (SA at 49, 52-54).

We find that all three of the above factors are valid reasons supporting the sanction of dismissal in this case. *See Martin v. DaimlerChrysler Corp.*, 251 F.3d 691, 694-95 (8th Cir. 2001), cited in *Allen v. Chicago Transit Auth.*, 317 F.3d 696, 703 (7th Cir. 2003) (affirming district court's dismissal of suit as sanction for repeated discovery-related

perjury); *Thomas v. GMAC*, 288 F.3d 305, 307 (7th Cir. 2002) (noting that dismissal with prejudice appropriate where "monetary sanction would probably be difficult to collect"); *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996), quoting *Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1052 n.4 (9th Cir. 1971) ("[T]he harshness of a dismissal with prejudice is directly proportionate to the likelihood that plaintiff would prevail if permitted to go forward to trial. Since harshness is a key consideration in the district judge's exercise of discretion, it is appropriate that he consider the strength of a plaintiff's case . . . ."). Given the unlikelihood that Maynard would prevail at this point if allowed to go to trial, it would seem to be a waste of resources for all involved if we were to reverse the district court's decision to dismiss Maynard's suit as a sanction for his discovery violations.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court,
Northern District of Illinois

Name of Assigned Judge Phillip G. Reinhard
CASE NUMBER 98 C 50193 DATE 2/14/2002
CASE TITLE MAYNARD vs. MCHENRY

DOCKET ENTRY:

(10) [OTHER DOCKET ENTRY] Hearing held on defendant's emergency motions [#113, #115]. Plaintiff's emergency motion for leave to file new affidavits instanter is granted. Defendant's motion to strike affidavits and pleadings is denied as moot. Transcript to stand as findings of fact conclusions of law. For the reasons stated in open court, defendant's emergency motion for involuntary dismissal and/or for sanctions pursuant to 37 is granted. The court enters the following sanctions against plaintiff/his counsel: (1) This case is dismissed with prejudice for discovery violation Defendant is awarded reasonable attorney fees, expenses, and costs incurred in bringing this emergency motion (1/2 to be paid by plaintiff and 1/2 to be by plaintiff's counsel); and (3) an additional sanction of $3,500 to be paid to the Clerk of Court for the court's time incurred an this emergency motion (1/2 to be paid by plaintiff and ½ to be paid by plaintiff's counsel).Defendant's emergency motion to supplement final pretrial order is moot. Defendant is entitled to the normal Rule 54 Costs incurred defending this lawsuit.

s/Philip G. Reinhard

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

HARRY L. MAYNARD, Docket No. 98 C 50193

Plaintiff, Rockford, Illinois
Thursday, February 14, 2002
1:30 o'clock a.m.

v.

COUNTY OF MC HENRY, et al.

Defendants.

VOLUME II
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES:

For the Plaintiff: FAVARO, BUZEK & GORMAN
(835 North Sterling,
Suite 100,
Palatine, Illinois 600067) by
MR. DENNIS R. FAVARO
MS. PATRICIA L. M. JOCHUM
MR. PATRICK L. GORMAN

For the Defendants: HARRISON LAW OFFICES, P.C. 16
(12420 Ware Road,
Woodstock, Illinois 60098) by
MR. JAMES T. HARRISON
MR. CLAY M. ULLRICK

Court Reporter: Mary T. Lindbloom
211 South Court Street
Rockford, Illinois 61101
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On March 25th Dr. Nager drafted his correspondence to Dr. Martinez that indicated that he believed that Mr. Maynard couldn't work. Now, it's more likely that the physician received this and was concerned about the conflicting information that he had put out previously, and perhaps he would have liability in that regard and decided that at that point in time, he should draft this letter himself.

In closing, your Honor –

THE COURT: It's an awfully strong accusation, counsel.

MS. JOCHUM: But, your Honor, we've had testimony from the plaintiff that he did not have that conversation.

THE COURT: I understand, and I'll have to make the credibility finding.

MS. JOCHUM: So, in closing, your Honor. I would state that the defendant has been unable to meet their burden of
proof and that the motion should be denied.

THE COURT: All right. I'm going to take a ten-minute recess and come back with my findings.

(Brief recess.)

THE COURT: All right. I'm ready to proceed. This is, as I've said from the outset, a very serious matter, and what is before me is the defendants' emergency motion

for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b) and/or for sanctions pursuant to Federal Rule

of Civil Procedure-37(c)(1).

37(c)(1) provides that a party without substantial justification who fails to disclose information required by Rule 26(a) or 26(e)(1), and after a hearing, may strike certain evidence or impose other appropriate sanctions, such as payment of reasonable expenses, including attorney's fees, caused by the failure and may include the sanctions under 37(b)(2)(A), (B), and (C), which include dismissal of the action.

Rule 37(b)(2)(B) requires for a dismissal a failure to comply with a discovery order and a showing of willfulness, bad faith, or fault on the part of the noncompliant party, but such a sanction must be infrequently resorted to, and, to take that most drastic step, the sanction must be one that a reasonable jurist apprised of all the circumstances would have chosen as appropriate to the infraction, and if the violation is inadvertent, isolated, or careless, and not a serious inconvenience, dismissal would be an excessively severe sanction. However, the district court is not required to select the least drastic or most reasonable sanction. The sanction must be appropriate to the circumstances surrounding the failure to comply with discovery, if such a failure is found.

The facts are that the discovery violation here centers on the April 4, 1996, report of plaintiff's treating

physician, Dr. David Martinez, and on January 4th, 1999, defendant, pursuant to Rule 34, requested production of plaintiff's medical records from each of the physicians or a release of the same, and on February 12, 1999, plaintiff responded he would forward the records to defendants' counsel, and on March 19th, 1999, plaintiff's second supplemental response was submitted to defendant, which included the records of Dr. Martinez, which purported to be the complete record, and the April 4, 1996, report was not included.

The April 4, 1996, report was not discovered by defendant until January 14, 2002, when defendant was preparing for trial and contacted Dr. Martinez, who told counsel of the report. Trial was previously set in this case to begin on February 11th, 2002, and those are the facts leading up to the then disclosure of the report.

The April 4th report, in my opinion, is clearly a document required to be produced under Rule 34, and I don't think plaintiff disputes that. That is, this was a document that was requested under that rule, and they sent the medical reports. So, it's clear that if this document was in their hands, it was a document that had to be provided under that rule.

And the court notes that there is an argument that this is not relevant, necessarily; that even if they had produced it, it would not be relevant. It is relevant, and

it's relevant for the following reasons. And I find it highly relevant to both the pretrial motion for summary judgment and at trial.

It would be relevant because Dr. Martinez's trial testimony as to plaintiff's condition in March and April of 1996, it was very relevant to plaintiff's ability to work, and the April 4 letter would directly bear on this adversely for the plaintiff, and Dr. Martinez would have had to testify to that, and if this report had not been produced, then defendant would not have had that to use at trial.

The April 4 report would also have been important taking Dr. Martinez's deposition in I believe it was June 1999 and was not available at that time in violation of the discovery rule. Plaintiff has argued that had defense counsel examined the records closely that were brought to the deposition by the doctor, then he could have discovered it. I agree. He did not. But defense counsel could rely on plaintiff's disclosure rather than have to look through the complete file at that time.

And it was further important, that April 4 report, for the summary judgment motion and could have impacted on my decision to in this case grant summary judgment. It also may have affected Dr. Sethi's ambiguous opinion had he known of the April 4th report, and I note that in his deposition plaintiff failed to bring him any of the prior medical reports. His

opinion might not have been the same in view of both Martinez's opinion and that of the neurosurgeon, Dr. Nager, which would have been disclosed in the April 4 letter.

And had not the defendant just discovered the April 4 letter, he would not have been able to ask Dr. Sethi at trial if his prior medical opinion might change. In other words, if we were going to go to trial and defense counsel didn't have this letter, there would be no way he could have cross-examined Dr. Sethi as to whether his opinion might have changed had he had these reports at the time he gave his opinions. My conclusion is the report is important both for pretrial and important at trial.

Now, as to the facts whether plaintiff willfully failed to disclose this in discovery. Because I've already found it's a relevant document that should have, the question really bears down, and the important one, is was this a willful failure to disclose this in discovery. The court finds as follows.

First, I credit and believe the testimony of Dr. Martinez and his secretary, Ms. Gannon, and his medical assistant that plaintiff requested the April 4 letter and that he requested it as urgent; that the plaintiff was upset with the March 4 letter and wanted to work and wanted the April 4 letter to release him. The April 4 letter was prepared, I find, on April 4 and left for plaintiff, and I will infer from

all the facts that-it was picked up by plaintiff because the original -- had he not picked it up, the original would have been in the file, as was the custom of the office if somebody did not pick up a document, and only the copy was in the office. The doctor's file, which I examined here today, is a pretty small file, and the April 4th document was within this small set of papers, where it was not on, a special page. It was in with all the other reports on the one page, and, therefore, I find there's little likelihood of that document not to be copied and sent by the doctor's office, and I find that it was.

There is some indication in the -- and I only say this as an aside, but some indication in the cross examination of the doctor that he shouldn't have talked to Attorney Harrison on the 14th, that he might have violated some doctor-patient privilege. The information that he gave on the 14th, other than the April 4 report, was all explored in his deposition, and, quite frankly, the information about his treatment was even requested to be disclosed to the defendant by the plaintiff in the March -- requesting the March 4 letter and, in my judgment, requesting the April 4 letter.

Now, as to the testimony of the plaintiff, he has denied that he ever requested or received the April 4 letter from the doctor. I do not credit you, Mr. Maynard. You had a motive to get another report from the doctor because of the

upcoming hearing. I believe you were untruthful when you said you neither requested or got the letter. There's no motive for the doctor to be untruthful, and, as far as I'm concerned your testimony has been contradicted by the doctor, and it's contradicted in part by the deposition testimony of Sheriff Maire. And even when confronted in cross examination about the necessity for receiving this report, you suddenly did not remember certain things related to that. The court finds as evidence that the plaintiff got the April 4 report, again, based on the deposition testimony of Maire and that you needed another physician's report and that you were upset, and you were actually angry at the doctor for the first report.

The court further finds that the plaintiff never produced this April 4 letter for defendant intentionally. Plaintiff in the amended complaint at paragraph 18, which is Exhibit J, falsely stated his physician would not change the wording from the original release. The court concludes the April 4 letter was willfully withheld from requested discovery.

Now, as to the sanction, the court has considered alternative sanctions in Rule 37(b)(2) short of dismissal; however, the most severe sanction, dismissal, is warranted for the following reasons. Defendants' awareness of the discovery violation occurred shortly before trial. Defendants' awareness of the discovery violation came not from plaintiff, but through a potential witness. The discovery violation is material and

prejudicial to the defendant. The violation is willful, in bad faith on the part of the plaintiff, who is a party to the suit. The plaintiff continues to deny his willful failure to turn over this report in discovery and has compounded that by untruthful testimony under oath and in his affidavit.

The plaintiff's case, even without this evidence favorable to the defendant, was weak and just barely survived summary judgment and might not have survived summary judgment. If I imposed lesser sanctions, the instructions that I would give the jury about the willful failure to disclose this report would further weaken your case.

And I look at the case, and the only viable claim, really, is for pension benefits. The rest of the case, you've earned more money on wages, and you've withdrawn your request for wages. You've drawn more money from wages from your new job. And the lawyers have informed me at settlement that each side has spent -- I think it's over -- my recollection it's a hundred and thirty some thousand dollars of attorney's fees. That's outrageous to have that built up in this case, and I'm not going to let this go any further. To impose sanctions other than dismissal would not be just to the defendant.

This case is dismissed against plaintiff for the discovery violation with prejudice under Rule 37(c), and as a further sanction against plaintiff under Rule 37(c)(1), defendant is awarded its reasonable attorney's fees and

expenses caused by having to bring this motion and all the proceedings subsequent. Counsel for the defendant shall resolve the fee issue in conformance with our local rule, and hopefully counsel will both agree upon those fees, but you will follow our local rule, and you're awarded the fees caused by having to bring this action.

The court also finds that the defendant is entitled to the normal Rule 54 costs against defendant, since this case has been dismissed. The court further finds against plaintiff as a sanction for bringing this motion, a sanction for the court's time. I've had to come in here and listen to testimony, perjured testimony, that I certainly should not have had to listen to. This has spent a great deal of my time, and the court, as a part of a sanction, can impose in a serious matter, which this is, additional sanctions, and I'm going to impose -- the court has spent at least seven hours on this case, at least three or four hours in court, and my law clerk has spent half that time, and I'm going to impose seven hours of fees as a sanction of $500 an hour. That will be $3500 in additional fees that are the responsibility for the plaintiff to pay.

And I'm also saying that you're lucky I don't impose fees for the -- the entire attorney's fees for the defendant in this case. They've spent an ungodly amount of money on this case. Where I would draw the line, I don't know, in terms of whether it would be starting from the deposition in 1999 or the

beginning or what. I'm not going to impose that because I've imposed a substantial fine as a sanction against the plaintiff for this. You might consider this, if you're considering an appeal, and defense counsel could consider a cross-appeal.

Now, as to the issue -- and I'm not finished. I've dismissed the case on the basis of the plaintiff's own violation, but the issue before me and it's raised is whether plaintiff's counsel is responsible for not disclosing the April 4 letter when it made its filing pursuant to a Rule 34 production of documents. If plaintiff's counsel withheld the April 4 report, that, too, is a violation of their obligation of a lawyer under discovery rules, and counsel can be subject to sanctions. I'll make my findings as to that.

I believe Ms. Kroncke, the former medical assistant who testified, that she copied all the medical records in Dr. Martinez's file for the plaintiff and sent them to plaintiff's counsel. Could this one-page letter have not been copied? Could it be one that got into some other file and in some way not made its way to the attorney's office? I think it's highly unlikely. This is not a large file, as I've said before, and, therefore, I believe it was sent. It is awfully coincidental that it is the same April 4 damaging report plaintiff says he never got and plaintiff's counsel state they never received. My conclusion is that it is more likely that the

April 4 letter was sent to plaintiffs counsel and received and subsequently either lost -- and I'm giving counsel the benefit of the doubt -- either lost by counsel or his law firm, withheld by somebody in the law firm, or plaintiff was given an opportunity to go through the medical file before it was sent, and he withdrew it. I don't know. There's nothing in the affidavits that say -- furnished to me by defendants that say that no one else was given access to that file and that counsel who submitted the affidavit said that they did not see it in the file, but that doesn't mean that somebody else couldn't have gone through the file.

I think that based upon all the evidence before me, as I say, it's more likely than not that that letter was sent than it is that it was not received. What happened at plaintiff's counsel's office, I don't know. I'm giving them the benefit of the doubt that it could have been lost or some other way other than a willful refusal. I can't imagine that they would willfully -- that a lawyer, Ms. Jochum, who has appeared before me, or Mr. Favaro, would intentionally withhold that document. But the fact remains that I think it was sent to the office, and the law firm is responsible for it.

And I want to add that plaintiff's counsel could have taken the approach -- once they became aware of the April 4 letter when it was made in the motion before this court, could have taken steps to verify the plaintiff's version that he did

not receive the report. Instead, what they did is attack the doctor, even suggesting at one point at one of the hearings discovery of his typewriters to somehow show he didn't write the letter.

The approach in front of me has been to blame the doctor, to blame defense counsel for not have discovering this in the doctor's file at the time of the deposition. I'm sure defense counsel learned a lesson. It's an unfortunate one, but better get your -- you better get a release -- when you request something of opposing counsel, you better get the release, get the records sent directly to you, rather than get them through counsel. The court also, as I expressed at the argument, Ms. Jochum, at the end, to try to blame this and create or manufacture a motive for the doctor is just not the case.

And, therefore, based on the fact that I believe the office received the report and that you are in violation of discovery and that this whole proceeding before me could have been one that had been avoided had you more carefully scrutinized and investigated your own client's testimony, I'm going to find that you shall, as an additional sanction, share one half in the cost of the proceedings that were brought for this sanction. So, you will share in one half of defendants' attorney's fees for this proceeding, and you will share one half of the $3500 cost of the court attributable to this

proceeding.

That concludes my findings. I don't like it when a case has to be dismissed. I was ready to go on the merits on this case. Counsel for the plaintiff, I'm not here to lecture you. I'm here to tell you that I believe your client gave untruthful testimony, and that's why the sanctions have been imposed. And I believe your office is responsible for accurate discovery materials being turned over pursuant to rule, and they were not done. That's all.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Mary T Lindbloom

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 02-1733, 02-1810 and 02-3477

HARRY L. MAYNARD, DENNIS R. FAVARO, PATRICIA L. JOCHUM and FAVARO, BUZEK & GORMAN, LTD.

Plaintiffs-Appellants / Cross-Appellees,

v.

KEITH NYGREN, in his official capacity as Sheriff of McHenry County, Illinois,

Defendant-Appellee / Cross-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 98 CV 50193—**Philip G. Reinhard**, *Judge*.

ARGUED JANUARY 23, 2003—DECIDED JUNE 10, 2003

Before BAUER, CUDAHY and COFFEY, *Circuit Judges*.

CUDAHY, *Circuit Judge*. Corrections officer Harry Maynard sued his former employer, the McHenry County Sheriff, alleging a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-213. On February 14, 2002, the district court, finding discovery violations, Fed. R. Civ. P. 37(c), granted the defendant Sheriff's motion to dismiss and assessed monetary sanctions against Maynard and his counsel, attorneys Dennis Favaro and Patricia

Jochum and the firm of Favaro, Buzek & Groman, Ltd. Maynard and his counsel appeal on the ground that the trial court failed make a finding of a discovery violation sufficient to sustain the sanction of dismissal. The appellants also claim that part of the monetary sanctions were improper and that there was insufficient cause to sanction counsel. The appellants ask us to vacate the district court order and remand to a different district judge under 28 U.S.C. § 455(a). The Sheriff cross-appeals, requesting additional attorney's fees from the appellants. We affirm in part and reverse in part and remand for reconsideration.

I.

Harry Maynard began working as a corrections officer at the McHenry County Sheriff's Department in 1992. In February 1996, Maynard was hospitalized and diagnosed with multiple sclerosis. Following his hospital stay, he presented his supervisor, Chief Maire, with a report (dated March 4) from his doctor, David Martinez, allowing him to return to work. However, Maynard was told by Maire that he would not be allowed to return to work because the report stated that he could have recurrent episodes of weakness and unsteadiness. Maynard met with Dr. Martinez to discuss Maynard's displeasure with the content of the March 4th report, and they arranged for Maynard to meet with a neurologist. On March 25, Benjamin Nager, a neurologist, wrote to Dr. Martinez confirming that Maynard should not be released back to work without restrictions. Based on this letter, Dr. Martinez wrote a second report on April 4, stating that Maynard was not then able to perform the functions of his job, but that he might become able within ninety days. Where this April 4th report ended up, and did not end up, lies at the root of Maynard's troubles; what is known is that the Sheriff was not given a copy of this report until this lawsuit was well underway.

The Sheriff's lawyer wrote Maynard in November 1996 to advise him that, as an alternative to releasing his medical records (something he was not legally obligated to do), Maynard could submit himself to an examination by an Independent Medical Examiner in order to determine his ability to return to work. In January 1997, Maynard met with Dr. Pradip Sethi, who confirmed that there was no guarantee that Maynard would be symptom-free or that he could perform all his job functions at all times. Based on Dr. Sethi's reports, the Sheriff terminated Maynard. This lawsuit alleging refusal to provide a reasonable accommodation under the ADA followed.

The Complaint and the Amended Complaint in this action failed to mention the existence of the second, April 4th, report of Dr. Martinez. Nor did the April 4th report appear during discovery, although Maynard's counsel forwarded to the Sheriff what was supposed to be all of Maynard's medical records from Dr. Martinez's file. The Sheriff finally learned of the April 4th report and received a copy of it from Dr. Martinez in January 2002, shortly before the trial date. The Sheriff then filed an emergency motion seeking involuntary dismissal and sanctions under Fed. R. Civ. P. 37(c)(1) for Maynard's failure to disclose the document. The trial judge held an evidentiary hearing to explore exactly what had happened to the April 4th report.

At the hearing, Dr. Martinez testified that he had prepared the April 4th report at Maynard's urgent request. Jeanne Gannon, Dr. Martinez's assistant, testified that she had typed the report and left it hanging in a public area of the office to be picked up. While she did not witness Maynard picking up the report, she concluded that the report had been picked up since the original was not returned to Maynard's medical file. On the other hand, there was no note in Maynard's chart showing that he had requested such a report (as there ordinarily would be), and Maynard denied that he had requested or received the report.

Cynthia Kroncke, Dr. Martinez's former medical assistant, also testified. She said that she had copied the entire Maynard file and had sent copies to Maynard's counsel in February 1999. In view of Dr. Martinez's testimony that a copy of the April 4th report was in the file in 2002, it appeared that Maynard's counsel had received the April 4th report during discovery, but somehow had failed to forward it to the Sheriff's counsel.

Judge Reinhard found that Maynard's denials were not credible, and that he had intentionally withheld the April 4th report. Judge Reinhard also noted that Maynard had lied in his Amended Complaint and in an affidavit by stating that Dr. Martinez would not change the original, March 4th report. Am. Compl. at 4, para. 18 ("Maynard tried unsuccessfully to obtain a different release, but the physician would not change the wording from the original release."); Maynard Aff., Pl.'s Resp. to Def.'s Emergency Mot. for Involuntary Dismissal Ex. G, at 1 ("I had never seen Dr. Martinez's April 4, 1996 letter until January 25, 2002 when it was provided to me by my counsel."). The judge dismissed Maynard's suit, awarded the Sheriff attorney's fees and costs incurred in bringing the emergency motion and assessed a fine of $3500 payable to the court for the time spent on the motion. Judge Reinhard also found that the April 4th report had been provided to Maynard's counsel, but he did not believe that counsel had deliberately withheld the letter, positing instead that the letter was either lost in the office or removed from the office, possibly by Maynard. Nonetheless, the monetary sanctions were divided evenly between Maynard and his counsel because the judge felt that the situation could have been avoided had counsel been more careful with the discovery documents or more diligent in investigating their client's testimony.[1]

[1] The order, in relevant part, stated:

(continued...)

II.

Discovery sanctions are reviewed for abuse of discretion. *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 642 (1976); *Johnson v. J.B. Hunt Transp., Inc.*, 280 F.3d 1125, 1130-31 (7th Cir. 2002). Under this standard, we uphold any exercise of the district court's discretion that could be considered reasonable, even if we might have resolved the question differently. *Johnson*, 280 F.3d at 1130-31. However, a district court by definition abuses its discretion when it makes an error of law, *Koon v. United States*, 518 U.S. 81, 100 (1996), and, while factual findings are generally reviewed only for clear error, findings which are tainted by the application of an inapposite standard are subject to fuller review, *see Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 931 (7th Cir. 2002) ("In cases of mixed questions of law and fact the standard is oftentimes clear error (or abuse of discretion), though plenary review may be used when certain factors indicate it is warranted or needed."); *cf. Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002) (noting that clear error generally governs when the question is whether a given rule had been applied properly to accepted facts).

We must first clarify the law of this circuit on the weight of evidence necessary to support dismissal as a discovery sanction. Then, we will consider the appropriateness of the other sanctions ordered by the district judge.

(...continued)

The court enters the following sanctions against plaintiff/his counsel: (1) This case is dismissed with prejudice for discovery violation; (2) Defendant is awarded reasonable attorney fees, expenses, and costs incurred in bringing this emergency motion (½ to be paid by the plaintiff and ½ to be paid by plaintiff's counsel); and (3) an additional sanction of $3,500 to be paid to the Clerk of Court for the court's time incurred on this emergency motion (½ to be paid by plaintiff and ½ to be paid by plaintiff's counsel)

A.

Of all possible sanctions, dismissal is considered "draconian," and we must be "vigilant" in our review. *Marracco v. Gen. Motors Corp.*, 966 F.2d 220, 223-24 (7th Cir. 1992). Because of its severity, we have circumscribed the range of cases in which dismissal may be used as a sanction. Looking at the case law, we find two different standards for determining whether a case can properly be dismissed. Some of our cases have held that actions can be dismissed "when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing." *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998); *Schilling v. Walworth Sheriff Park and Planning Comm'n*, 805 F.2d 272, 278 (7th Cir. 1986). This appears to be the standard used when cases are dismissed for want of prosecution or failure to comply with orders of the court, Fed. R. Civ. P. 41(b). A slightly different requirement—a finding of willfulness, bad faith or fault—comes into play when dismissals are used specifically as a discovery sanction under Fed. R. Civ. P. 37.[2] *In re Golant*, 239 F.3d 931, 936 (7th Cir. 2001); *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997); *cf. In re Rimsat, Ltd.*, 212 F.3d 1039, 1046-47 (7th Cir. 2000) (requiring a finding of bad faith when a district court dismisses a case under the inherent powers of the court). That is, even without "a clear record of delay, contumacious conduct or prior failed sanc-

[2] In *Ladien v. Astrachan*, 128 F.3d 1051, 1056 n.5 (7th Cir. 1997), we noted that the overlap between Rules 41(b) and 37(b)—both cover failures to comply with orders of the court—and the slightly different requirements for justifying dismissal under each rule pose a conflict. While this question is not before us today—we have a Rule 37(c) violation only—we assume that Rule 37(b), as the more specific provision, would apply when discovery orders are at issue. *But see Lucien v. Breweur*, 9 F.3d 26, 29 (7th Cir. 1993) ("The criteria for sanctions under Rules 16(f), 37(b), and 41(b) are the same.").

tions," a court can apply the sanction of dismissal for Rule 37 violations with a finding of willfulness, bad faith or fault, as long as it first considers and explains why lesser sanctions would be inappropriate. *See Long v. Steepro*, 213 F.3d 983, 986 (7th Cir. 2000); *Schilling*, 805 F.2d at 278 ("When a clear record of delay, contumacious conduct, or prior failed sanctions does not exist, the exercise of judicial discretion requires that the district court consider and explain the inappropriateness of lesser sanctions."); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1478-79 (D.C. Cir. 1995) (requiring that courts provide a "specific, reasoned explanation for rejecting lesser sanctions" and collecting cases requiring same).

We have not yet answered the question of what burden of proof is necessary to sustain a Rule 37 dismissal based on willfulness, bad faith or fault. For Rule 41(b) dismissals, the record of delay, contumacious conduct or prior failed sanctions must be "clear." *Williams*, 155 F.3d at 857. Is there a similar requirement for the evidence supporting a finding of willfulness, bad faith or fault? The Sheriff argues that a preponderance of the evidence suffices, while Maynard argues that there must be clear and convincing evidence before a case is dismissed for a discovery violation. *See Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, at *103 (N.D. Ill. Oct. 23, 2000) (following *Shepherd*, 62 F.3d at 1472, 1477, and applying a clear and convincing evidence standard). We agree with the appellants that, considering the severe and punitive nature of dismissal as a discovery sanction, a court must have clear and convincing evidence of willfulness, bad faith or fault before dismissing a case.[3] *See Shepherd*, 62 F.3d at 1476-77

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[3] This holding brings the evidentiary standard applicable here into line with the standard applicable to justify dismissal for delay, contumacious conduct or failed sanctions. In all circum-

(continued...)

(comparing dismissal as a discovery sanction to civil fraud and civil contempt); *cf. Aoud v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (holding that fraud on the court must be demonstrated "clearly and convincingly"); *Pfizer, Inc. v. Int'l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976) (a finding of fraud on the court "must be supported by clear, unequivocal and convincing evidence"); *Scholastic, Inc. v. Stouffer*, 221 F. Supp. 2d 425, 439 (S.D.N.Y. 2000) (applying the clear and convincing evidence standard to dismissal for a fraud on the court).

Working without the benefit of a clear pronouncement from this court on the appropriate burden of proof, the district judge did not specify which standard he was applying. *Cf. Danis*, 2000 U.S. Dist. LEXIS 16900, at *103 (applying the clear and convincing evidence standard in the absence of contrary guidance). We are left to deduce from the record which standard was applied. We agree with the appellants that the district court may have applied a preponderance standard. This belief is grounded principally on the portions of the ruling which deal with Maynard's counsel's culpability. On two occasions, the district judge noted that it was "more likely" than not that the April 4th report was sent to counsel. Tr. of Proceedings (Tr.) at 148-49 (Feb. 14, 2002). We also note the circumstantial nature of much of the evidence, which makes this perhaps a closer case than some. While we cannot conclude with certainty that a preponderance, rather than a clear and convincing, standard was applied, the absence of any assurance that the higher burden of proof was considered advises us to assume for the purpose of this appeal that the lower threshold was used.

The Sheriff argues now that, regardless of the standard used below, the evidence is in fact clear and convincing, and

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(...continued)
stances, to justify dismissal as a sanction, there must be clear and convincing evidence.

that we should affirm the dismissal. And the evidence does appear to support the Sheriff's positions and the district court's conclusions quite strongly. The court reasonably relied on the persuasive testimony of Dr. Martinez and his staff in finding that Maynard had acted in bad faith in concealing evidence during pleadings and discovery. However, especially because factual determinations such as these are the special province of the trial judge, we must defer to the trial judge and allow him to reconsider the evidence in light of the standard announced here.[4] In remanding the case, we do not find appropriate the recusal of Judge Reinhard, and are confident that he will approach this determination without preconception. Nothing in the record persuades us otherwise. *See Grove Fresh Distribs., Inc. v. John Labott, Ltd.*, 299 F.3d 635, 640 (7th Cir. 2002) (holding that bias must be proven by compelling evidence of "deep-seated favoritism or antagonism as would make fair

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[4] As appellants' counsel acknowledged at oral argument, a further hearing is probably unnecessary. However, two points may be worth noting. As noted above, in cases not involving a clear record of delay, contumacious conduct or failed prior sanctions, district courts must explain why sanctions lesser than dismissal would not suffice. The appellants complain that the district court did not satisfy this requirement adequately. While we recognize that the district court did consider some lesser sanctions, *see* Tr. at 146, it would be helpful if the judge discussed in greater detail specific potential sanctions and their inadequacy. In particular, Rule 37(b)(2)(A) and (B) provide sanctions that the district court may consider. The appellants also express concern that the district judge's order was based on an erroneous finding of the importance of the April 4th report. If indeed the legal significance of the April 4th report is a principal basis for dismissing this case, rather than imposing a lesser sanction, it may be worthwhile for the district judge to elaborate on any effect earlier disclosure of the document might have had on pretrial rulings. *See* Tr. at 142 ("[The report] could have impacted on my decision to. . . grant summary judgment.").

judgment impossible" (citing *Liteky v. United States*, 510 U.S. 540 (1994))).

B.

Even if the district court upon reconsideration declines to dismiss this lawsuit—and we make no recommendation on the matter—there remain the other, non-dismissal sanctions, which are generally permissible even without clear and convincing evidence. The monetary sanctions imposed by the district judge included both attorney's fees to the Sheriff and a $3500 fine for the court's time. Half of these amounts was to be paid by Maynard and half by Maynard's counsel. The appellants argue that the $3500 fine was an abuse of discretion, as was any sanction against counsel.

As to the $3500 fine, the appellants provide no case law that supports their argument. On the contrary, there is ample case law validating the use of fines, especially where they are "remedial" and correspond to some real cost (here, the court's time at $500 per hour). *Classic Amenities, Inc. v. Verbeke*, No. 00 C 3326, 2001 U.S. Dist. LEXIS 7465, at *5-6 (N.D. Ill. June 4, 2001) (assessing a $5000 fine for a Rule 37 violation and collecting cases assessing court fines); *cf. United States v. Dowell*, 257 F.3d 694, 699-700 (7th Cir. 2001) (approving a fine of approximately $2500, imposed in a civil contempt order, based on the cost to the government of a lawyer's failure to appear at trial). While fines are not specifically included in the non-exclusive list of sanctions in Rule 37(b)(2), they are among the tools available to trial courts to remedy the harms of discovery violations. Such a fine was within the discretion of the district judge.

The second question demands more analysis. We see two potential bases for upholding the district court's sanction against Maynard's counsel: the Federal Rules of Civil Procedure and the inherent powers of the court. Reading

the transcript of the proceedings below, it is not clear on which the district court was basing the sanctions; thus, we consider whether the sanctions against Maynard's counsel would have been permissible under either authority.

We agree with the appellants that *Insurance Benefit Administrators v. Martin*, 871 F.2d 1354, 1360 (7th Cir. 1989) (*IBA*), does not permit the imposition of Rule 37(c) sanctions on attorneys. *See also Apex Oil Co. v. Belcher Co. of N.Y.*, 855 F.2d 1009, 1014 (2d Cir. 1988) (refusing to extend Rule 37(c) sanctions to counsel); Fed. R. Civ. P. 37(c) advisory committee's note to 1970 amendment (Rule 37(c) requires "that *the party* improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.") (emphasis added); *cf. Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-65 (1980) (noting that Rule 37(*b*) explicitly allows sanctions against attorneys); Fed. R. Civ. P. 37(b)(2) ("[T]he court shall require the party failing to obey the order *or the attorney advising that party* or both to pay the reasonable expenses.") (emphasis added). In *IBA*, we held that attorneys can be sanctioned for failure-to-disclose violations only under Rule 26(g)(3), which authorizes sanctions against attorneys who certify discovery disclosures in violation of the rules. In the case at hand, because the court found that counsel had no knowledge that the discovery response was inadequate, there is no ground for a sanction under Rule 26(g), which applies only to knowing violations of the rules. Any sanction against Maynard's counsel based on Rule 37(c) or 26(g) was improper.

The district judge's finding of no willfulness also precludes any sanction against counsel under the inherent powers of the court. While generally the inherent powers of the court can extend beyond those powers granted in the Federal Rules of Civil Procedure, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (specifying that the inherent powers are not limited by the Federal Rules of Civil Procedure), the assessment of fees against counsel under the inherent pow-

ers of the court is permitted only when there is a finding of willful disobedience or bad faith, *Roadway Express*, 447 U.S. at 755-56. *See also United States v. Johnson*, 327 F.3d 554 (7th Cir. 2003) (disallowing a punitive sanction under the inherent powers of the court where there was no bad faith). Here, however, the district judge found explicitly that counsel did *not* willfully withhold the document—the judge blamed the document's disappearance on negligent mishandling. There is no authority under the Rules or under the inherent powers of the court to sanction attorneys for mere negligence, and so sanctions must be reversed as applied to Maynard's counsel.

III.

The Sheriff cross-appeals, arguing that he should have been awarded all his attorney's fees, and not merely those incurred in bringing the successful motion for dismissal. The Sheriff argues that such full reimbursement is required by the text of Rule 37. However, Rule 37 supports only the reimbursement of fees resulting from the discovery violation. Fed. R. Civ. P. 37(c)(1) (allowing courts to require "payment of reasonable expenses, including attorney's fees, *caused by the failure*") (emphasis added). As long as the suit as a whole was not frivolous, and we have no reason to believe that it was, the remaining attorney's fees would have been incurred even without the discovery violation; thus, the causality requirement was not met. The Sheriff also argues that attorney's fees are required under Rule 41, under which a dismissal not otherwise grounded "operates as an adjudication on the merits." However, the American Rule is generally that prevailing parties are *not* entitled to fees, even where a full adjudication on the merits has taken place. The Sheriff's claim under the ADA, 42 U.S.C. § 12205, also fails since there was no finding that Maynard's claim was frivolous, unreasonable or without

foundation. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). None of the bases for cross-appeal are therefore valid.

IV.

For the foregoing reasons, the judgment of the district court is REVERSED in part and AFFIRMED in part.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in

which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable

expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing

agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for

hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

42 USCS § 12101 (2004)

§ 12101. Congressional findings and purposes

(a) Findings. The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely

disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 USCS § 12102 (2004)

§ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 12111. Definitions

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs.

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 USCS § 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a

job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is

shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 USCS § 12201 (2004)

§ 12201. Construction

(a) In general. Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws. Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act. Nothing in this Act shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by title I [42 USCS §§ 12111 et seq.], in transportation covered by title II or III [42 USCS §§ 12131 et seq. or 12181 et seq.], or in places of public accommodation covered by title III [42 USCS §§ 12181 et seq.].

(c) Insurance. Titles I through IV of this Act shall not be construed to prohibit or restrict--

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from

establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title [titles] I and III [42 USCS §§ 12111 et seq., 12181 et seq.].

(d) Accommodations and services. Nothing in this Act shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

42 USCS § 12203 (2004)

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) Remedies and procedures. The remedies and procedures available under sections 107, 203, and 308 of this Act [42 USCS §§ 12117, 12133, 12188] shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to title I, title II and title III [42 USCS §§ 12111 et seq., 12131 et seq., 12181 et seq.], respectively.

42 USCS § 12205 (2004)

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

WONDER LAKE MEDICAL CENTER
of Memorial Hospital, Woodstock
7404 Hancock Drive • Wonder Lake, Illinois 60097 • (815) 728-0438

David Martinez, D.O.
Family Practice

March 4, 1996

To Whom It May Concern:

HARRY MAYNARD has been under my care due to illness. He may return to work Saturday, March 9, 1996. He is still under treatment. He could have recurrent episodes of weakness and unsteadiness.

Sincerely,

David Martinez, D.O.

DM:la

B115

WONDER LAKE MEDICAL CENTER
of Memorial Hospital, Woodstock
7404 Hancock Drive • Wonder Lake, Illinois 60097 • (815) 728-0438

David Martinez, D.O.
Family Practice

April 4, 1996

To Whom It May Concern,

RE: Harry Maynard

Mr. Maynard has been diagnosed with mulitple sclerosis with the most recent symptoms dating back to February of 1996. His illness has kept him from being able to perform the duties of his job. He was further evaluated by a neurologist, Dr. Benjamin Nager who confirmed the diagnosis and his inability to work. He is currently under going treatment for his illness, and although I can't definitely predict his recovery, it is hoped that he will be able to return to work in the next ninety days.

Sincerely,

David Martinez, D.O.

DM:jg

B117

Benjamin J. Nager, M.D.
Northwestern Neurology, S.C.

20 E. Terra Cotta, D
stal Lake, IL 60014

Diplomate American Board of Psychiatry and Neurology
Added Qualifications In Clinical Neurophysiology
Diplomate American Board of Electrodiagnostic Medicine

Phone:(815)455-180
Fax:(815)455-187

March 25, 1996

David Martinez, D. O.
7404 Hancock Drive
P. O. Box 415
Wonder Lake, IL 60097

Re: Harry Maynard

Dear Dave:

Mr. Maynard returned for a follow-up visit. He has been doing very well with the Betaseron. As you are aware, he has not yet returned to work. Mr. Maynard was kind enough to forward a position description for correction officer, which is apparently Mr. Maynard's position.

On examination, Mr. Maynard still had some nystagmus on right lateral gaze which was not present in left gaze. Sensory testing in the arms and legs was normal. Strength was normal. Rapid alternating movements were slightly slower on the left than the right. Reflexes were brisk throughout. Gait was mildly ataxic. The patient was not able to perform tandem gait and tended to fall to the right. Romberg's sign was present.

Mr. Maynard still has some deficits related to his exacerbation of MS. He is doing much better and seems to be tolerating the Betaseron quite well. In regards to Mr. Maynard's duties at work, I have some concerns about his return to work without any restrictions. Specifically, I am concerned that Mr. Maynard is required to be able to perform inmate escorts and transports and, at times, may be the only corrections officer with a particular prisoner. In addition, the patient must be able to run and have sufficient capability to carry a human being from a hazardous area and the average weight is listed as 150 pounds. Given Mr. Maynard's balance problems, I am concerned that he may not be able to fulfill these duties safely at the present time. I explained this to Mr. Maynard and he told me that he was very disappointed. He does have an appointment with Dr. Floyd Davis in Chicago in about one month. I am hopeful that Mr. Maynard's deficits will have improved by the time he sees Dr. Davis. I will be seeing Mr. Maynard back in a few months for follow-up.

Sincerely,

Benjamin J. Nager, M.D.

BJN:leb

B1 16

HARRISON LAW OFFICES, P.C.

A Professional Service Corporation

JAMES T. HARRISON

Attorney at Law

David R. Skowron, Attorney
Robert W. Funk II, Attorney
Linda K. Kuzel, Paralegal

Mr. Harry L. Maynard
9913 Thayer Road
Ringwood, IL 60072

November 12, 1996

Dear Officer Maynard,

I am writing to you on behalf of the Sheriff with respect to your medical condition and related absence from the Sheriff's Department. I have spoken with Attorney Thomas Esbrook from the United States Department of Justice, Civil Rights Division, Disability Rights Section, about your concerns pertaining to correspondence that you have received from the Sheriff's Office related to this matter. I have informed Mr. Esbrook that I have been retained by the County and Sheriff to assist them in handling this matter.

I am also in receipt of a letter to you from Sheriff Mullen dated September 13, 1996 wherein the Sheriff requested additional information from you pertaining to your medical condition. I understand that this request was the catalyst for your call to the Department of Justice. Therefore, please allow me to flesh out the reasons for this request and what the Sheriff and County require from you as it pertains to this request.

As a jumping-off point, please understand that the Sheriff has statutory responsibilities under the Americans with Disabilities Act (hereinafter ADA) when making an employment determination pertaining to an individual with a disability. It is my understanding that the following relevant facts pertain to this matter: You currently suffer from multiple sclerosis; you used some of your paid time off prior to obtaining a conditional release to return to work from your doctor on March 4, 1996; your doctor released you to return to work on March 9, 1996, but included in the release certain restrictions pertaining to your medical condition; your release to return to work was conditionally denied unless you were able to obtain a release to return to work without restrictions; you never subsequently produced an unconditional release to return to work; on March 31, 1996 you requested a leave of absence for an indefinite amount of time for medical reasons, having exhausted all of your paid leave time; on April 2, 1996 you were requested to produce supporting documentation relating to your medical condition; on August 27, 1996 Chief Maire again requested documentation of your condition so that your request for a leave of absence could be evaluated and so the Sheriff could evaluate his responsibilities under the ADA; finally, you have used all available paid leave and all unpaid leave authorized by the Family and Medical Leave Act during your leave of absence. It is the aforementioned facts that have brought us to this point.

12420 Ware Road, Woodstock, IL 60098 Telephone No. (815) 338-7773 FAX No. (815) 338-7738

Now we turn to the ADA and the statutory requirements of an employer and an employee under that Act. Please understand that no one contests the fact that you are an "individual with a disability" as that term is defined under the ADA. However, after it has been determined that you are an individual with a disability, the next inquiry turns on whether you are a "qualified" individual with a disability as that term is defined under the ADA. Essentially, a qualified individual with a disability is a person with a disability who, with or without a reasonable accommodation by the employer, is able to perform the essential functions of the employment position. This is essentially the stage that we are at currently. In order to determine whether you are able to perform the essential functions of your employment position, the employer requires additional information. Typically, McHenry County seeks to obtain a release from the affected employee so that the employer can communicate directly with the employee's physician to determine the diagnosis, prognosis, and anticipated treatment plan of the employee. Usually, the employer also provides the employee's physician with a copy of the employee's job description so that the physician can inform the employer whether the employee's condition precludes the employee from performing any of the essential functions of the employment position, or in the alternative, whether the employee's condition can be reasonably accommodated by the employer so as to allow the employee to continue to work in the employment position.

Should the employee refuse to release the information to the employer, (which is the employee's right to do so), then the employer can order an independent medical examination of the employee by a physician retained by the employer in order to assess the employee's condition and to answer the questions relating to the employee's ability to perform the essential functions of the employment position. Sometimes an independent medical examination is also required by the employer if the information supplied by the employee's physician is insufficient or disputed. Therefore, it is necessary for you to either allow your physician to release medical information pertaining to your condition to the employer, or alternatively, for you to submit to an independent medical examination at the employer's expense. The Sheriff is indifferent as to which alternative you choose but one or the other must occur for the Sheriff to render an informed determination pertaining to his ability to reasonably accommodate your disability under the provisions of the ADA. Note also that any information disclosed by you or your physician must be kept confidential by the employer.

Following your release of medical records to the employer and your release to the employer to speak with your physician, (or in the alternative, or supplementally, following your independent medical examination), the employer will make a determination as to whether you require a reasonable accommodation, and if so, whether the employer can reasonably accommodate your disability within the existing employment setting. Please understand that the employer cannot make this determination without medical evidence supporting such a determination. It is only where an employee refuses to release medical information to his employer and also refuses to participate in an independent medical examination that the employer's hands become tied and the employer cannot make a determination as to whether a reasonable accommodation can be made. In such a non-cooperative scenario, the employer's duty to reasonably accommodate the employee would likely be waived. The type of determination needed to be made is strongly tied to medical evidence and opinions; since the Sheriff and County are not physicians, they do not have the foundation to render such medical

opinions. Thus, the necessity for a medical opinion concerning your condition and ability to return to work and to perform the essential functions of your job.

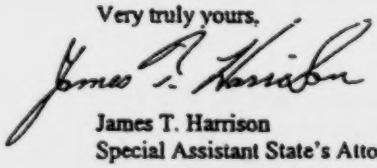
What the Sheriff would request of you is for you to meet with the Sheriff, or his designee (most likely Chief Maire), and myself so that we can get the ball rolling on determining whether the Sheriff can reasonably accommodate your disability or whether an accommodation is even necessary. I would request that you coordinate a date and time with my office and with Chief Maire to decide when we could meet to discuss these matters. Because I have a litigation practice, it is necessary to provide some advance notice of the meeting so that I may be present. After we have discussed this matter and have reviewed the medical documentation and records pertaining to your condition and your ability to return to work, at that point in time, the Sheriff will make a final determination with respect to your ability to return to work and his ability to reasonably accommodate your disability if possible. Should you then feel that the Sheriff has not complied with the statutory requirements pertaining to reasonable accommodation of an individual with a disability, the date of the Sheriff's final determination will be the date of the employer's final action in this matter should you subsequently decide to pursue a claim under the ADA.

At this point, however, the Sheriff has not made a final determination regarding these matters but would very much like to review this matter in full. It is, however, mandatory that you meet with myself and the Sheriff's designee to discuss these matters. You can, of course, choose not to disclose your medical records or medical condition. You may also choose not to submit to an independent medical examination if requested to do so. Finally, you may refuse to meet with the Sheriff or his representatives regarding this situation. However, please note that your refusal to assist the Sheriff in rendering a determination pertaining to accommodation of your disability by refusing to disclose medical information and refusing to submit to an independent medical examination will result in the Sheriff's inability to evaluate your disability and will result in a determination that you are on an unauthorized leave of absence for which you could be subjected to disciplinary action, up to and including discharge from employment. Likewise, should you choose also not to meet with the Sheriff's designee and myself for purposes of evaluating this situation, you could also be subjected to disciplinary action. No one wishes to pursue discipline in this instance and such actions are highly unnecessary. This process is routinely applied to other County employees from other offices besides the Sheriff's office. The whole purpose is to make an informed decision as it relates to an employee with a disability and the employer requires your assistance to make such a decision.

Finally, if the worst case scenario were to occur, (i.e. you suffer from a disability which precludes you from performing the essential functions of the employment position and the employer is not able to reasonably accommodate your condition), then there are avenues available through the Illinois Municipal Retirement Fund to provide temporary or permanent disability benefits to covered employees. Oftentimes, an employee who received temporary disability benefits pertaining to a medical condition, and who later is diagnosed as being in remission, can be reinstated to employment under the strictures of the IMRF rules. Then the reasonable accommodation process would necessarily be revived in order to make a current determination whether the employee could then perform the essential functions of the position and/or whether the employer could then reasonably accommodate the employee's disability.

Please contact my office upon receipt of this correspondence so that we can begin the process. If I am unavailable at the time you call, please feel free to speak with my paralegal, Linda Kuziel, who will assist you in scheduling an appointment. I am sending a copy of this letter to Mr. Esbrook of the Department of Justice so that he can keep a copy for his file. Also, if you have any questions pertaining to this matter, please feel free to discuss those with me also. Please understand also that this process need not be an adversarial process. The ADA places protection over qualified individuals with disabilities and also requires that certain action be taken by the employer. All that the Sheriff seeks at this time is to be able to intelligently address this issue and to come to an informed decision. If a reasonable accommodation is available, the Sheriff will reasonably accommodate your disability. I look forward to hearing from you.

Very truly yours,



James T. Harrison
Special Assistant State's Attorney

cc: R. Glenn Gable
Sheriff William Mullen
Chief William Maire
Thomas Esbrook Esq.

PRADIP SETHI, M.D., S.C.
NEUROLOGY

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January 14, 1997

Mr. James T. Harrison
Special Assistant State's Attorney
1242 Ware Road
Woodstock, Illinois 60098

RE: MAYNARD, Harry

Dear Mr. Harrison:

I saw Mr. Haynard at your request today. At the time I reviewed the notes that you had provided me. I did not have any other medical records on this patient from his previous workups. This is a 51-year-old, left-handed gentleman. He is here because of multiple sclerosis. This diagnosis was made in February of last year. At that time, initially the patient had an episode of numbness involving his left side, including his left upper and lower extremities and his scalp. Subsequently, after this was getting better, he had a similar episode of numbness and some weakness on the right side. He was admitted and had a complete workup, according to his history, which was provided by him and his wife, who sat in through the exam. This included an MRI scan, diagnostic tests, as well as a lumbar puncture. A diagnosis of MS was made. Subsequently, he was treated with some steroids and currently he is on Betaseron which he takes according to the provided dose and regularly. His condition has improved significantly.

He occasionally notices a slight problem with his balance and walking. He does not notice much fatigue. He is not heat sensitive. He also complains of numbness of both upper extremities and some pain in his right wrist. He still has symptoms suggestive of a Lhermitte's phenomenon. All of these symptoms seem to come and go and he has good days and bad days. He is not taking any other medication other than an inhaler for asthma.

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BEST AVAILABLE COPY

His previous history is significant in that about five years back he suffered an episode of numbness and he cannot even remember the details of this. He was worked up at that time but no clear etiology was arrived at for that problem. He has done well in the interim. His family history is significant for a daughter who is 26 years old and has multiple sclerosis. There is no other family history of any neurological disease and the patient is otherwise health. The patient apparently works part time driving a truck and does quite a bit of physical work at home without any trouble. There is no history of any alcohol intake and he does not smoke. His weight is stable and he has no other systemic symptoms.

His examination today shows his mental status and speech to be normal. There are no cranial nerve abnormalities. In his upper extremities, he has good strength. There is mild ataxia on finger-finger-nose testing bilaterally, perhaps slightly more on the right side. Rapid alternating movements are also slightly impaired. In his lower extremities also, he has good strength. The Romberg sign is negative. However, he has mild difficulty with tandem walking. He is diffusely hyperemic in all four extremities and has sustained clonus in both legs with bilateral Babinski signs. Sensory exam of his lower extremities is fine. In the upper extremities, he has mild loss to vibration in the right hand. Also, he has evidence of a sensory loss in the right hand and this extends up in the C8 type of distribution along the medial aspect of his forearm. Examination of his spine is normal.

This patient probably does have multiple sclerosis. For me to definitively confirm this diagnosis, I would need to review his previous workup that was done in February of last year. This should include diagnostic blood tests, spinal fluid evaluation and reports of his MRI scan. The diagnosis of M.S. is a clinical diagnosis, but supportive evidence in the form of an MRI, spinal fluid examination and blood tests are essential to the diagnosis.

As regards to his treatment plan, the patient should continue taking Betaseron, which he is doing at the present time. He needs no further treatment at the present time. As regards to his position as a corrections officer, I have reviewed his job functions, as well as the physical demands of his work. Certainly this patient has mild neurological deficits. These include an element of ataxia in his upper and lower extremities and trunk. Also, he has evidence of some stiffness in his lower extremities. There is mild sensory loss in his upper extremities also. Although these deficits are fairly mild, they could fluctuate on a day-to-day basis and certainly an element of fatigue could make them worse.

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On reviewing the physical demands that would be placed on him, it is certainly possible that his ability to walk, run or balance, stoop, climb, and kneel could be impaired. Certainly his ability to pick up a weight of 150 pounds in an emergency situation could be compromised to a slight extent. As regards to more sedentary aspects of his job, such as operating various electronic controls and panels and viewing video monitors, I think these could be done very safely.

Lastly, the prognosis of this condition is somewhat uncertain. Although it appears that Mr. Maynard's condition is following a benign course, and will continue to do so, this cannot be guaranteed with absolute certainty as he could have another attack of a neurological deterioration at some time in the future.

I hope you will find this report sufficient. I will be glad to review medical records if you deem it appropriate.

Sincerely,

Pradip Sethi

Pradip Sethi, M.D.

PS/lst

PRADIP SETHI, M.D., S.C.
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Telephone (847) 381-8762

March 31, 1997

Mr. James T. Harrison
Attorney At Law
12420 Ware Road
Woodstock, Illinois 60098

RE: MAYNARD, Harry

Dear Mr. Harrison:

This is a follow up of my initial report that I sent to you regarding Mr. Maynard. I will try to address some of the questions you have raised in your letter to me from March 25, 1997.

I was able to review Mr. Maynard's previous medical records. I do believe that he does have multiple sclerosis.

As regards to your second question regarding his ability to perform all of his essential functions as a correctional officer, that is a more difficult question to answer with certainty. As you are aware, patients with multiple sclerosis can have fluctuations in the intensity of their symptoms. If a patient with this disease is going through what we call an exacerbation, or when he is fatigued, all of his neurological deficits could temporarily increase in severity.

To answer your question, I do believe that Mr. Maynard may not be able to perform all of his essential functions as a correctional officer all of the time.

I hope this information is sufficient for your needs.

Sincerely,

Pradip Sethi, M.D.

(2)

Supreme Court, U.S.
FILED
NOV 2 2 2004
OFFICE OF THE CLERK

No. 04-389

IN THE

Supreme Court of the United States

HARRY MAYNARD,

Petitioner,

v.

KEITH NYGREN, not individually but as Sheriff of McHenry County, Illinois,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

JAMES T. HARRISON
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SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari rests upon two false premises. The first false premise is Petitioner's claim that there is a conflict among the Appellate Circuits concerning the standard for dismissal under Rule 37 of the Federal Rules of Civil Procedure. The Supreme Court announced the standard for a Rule 37 dismissal in *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 1096 (1958), finding that Rule 37 authorizes dismissal of a complaint because of petitioner's non-compliance with pretrial production when it has been established that failure to comply was due to willfulness, bad faith, or any fault of the petitioner. Petitioner cites no cases holding to a different standard and consequently no conflict exists among the Appellate Circuits. Moreover, Petitioner's discovery violation was willful, intentional and occurred in bad faith, consonant with the standard announced in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and therefore dismissal of his case as a sanction under Rule 37 was proper.

The second false premise underlying the Petition for Writ of Certiorari is that the holding of the Seventh Circuit in *Maynard v. Nygren*, 372 F.3d 890 (7th Cir. 2004) is at odds with the Supreme Court's ruling in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). Petitioner fashions his case as one wherein dismissal was granted as a sanction for the singular failure to produce one document during discovery; such is not the case. While it is true that Petitioner did fail to disclose the document during the litigation, he also made false allegations in his complaint and in his amended complaint, filed a false affidavit with the District Court and gave perjured testimony during an evidentiary hearing before the District Court. The totality of

Petitioner's misconduct was extreme and resulted in the proper dismissal of his lawsuit as a Rule 37 sanction. Because Petitioner's misconduct satisfied the standard announced in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the decision of the Seventh Circuit is consistent with the ruling of the Supreme Court in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), and thus the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Relevant Procedural Background

Petitioner, Plaintiff Harry Maynard (hereinafter "Maynard") filed a one-count complaint on June 25, 1998, pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, alleging that the Respondent, Keith Nygren, Sheriff of McHenry County (hereinafter "Sheriff") discriminated against Maynard in violation of the ADA. Doc. 1.[1] The Complaint alleged that the Sheriff violated the ADA when he did not reinstate Maynard to his position as a corrections officer after Maynard's repeated hospitalizations for incapacitating symptoms of multiple sclerosis. *Id.* Maynard subsequently filed an Amended Complaint. Doc. 11.

At the close of discovery, the Sheriff filed a Motion for Summary Judgment. Doc. 54. The trial court granted in part

1. Citations to the Record on Appeal are set forth as follows: Document number from the record on appeal ("Doc. ", followed by exhibit designation (if any) ("Exh.") and page or paragraph number (if any) ("p. " or "¶ "). Citations to the Supplemental Appendix to the Record on Appeal are set forth as ("SA ") and page number ("p. "). Citations to materials contained in the Petitioner's Appendix are set forth as ("App.") followed by the page number ("p.).

and denied in part the Sheriff's Motion for Summary Judgment, holding that no reasonable accommodations were available for the Plaintiff in the jail. Doc. 71, p. 12. The Court denied summary judgment with regard to Plaintiff's allegation of discriminatory discharge, finding that there was "at least a question of fact whether plaintiff was a qualified individual under the ADA." *Id.*

Shortly before trial was to begin, counsel for the Sheriff became aware of an undisclosed piece of evidence, a document that had been given to Maynard by his physician on or about April 4, 1996. Doc. 113, 114; App. 78. The April 4, 1996 document established that at the time Maynard sought reinstatement to his position as a corrections officer at the jail, his treating physician and a consulting neurologist had both concluded that Maynard was not able to perform the essential functions of his job due to his illness. *Id.* The document was never disclosed by Plaintiff or his counsel during the litigation. The Sheriff then filed an emergency motion under Rule 37 for involuntary dismissal and for sanctions. Doc. 113.

The trial court conducted evidentiary hearings pursuant to the Sheriff's Emergency Motion on February 7, 2002 and February 14, 2002. Doc. 139; 140. At the conclusion of the hearing, the trial court found that Maynard made false allegations in his Complaint, that Maynard intentionally and willfully withheld the April 4, 1996 document in violation of discovery rules, that Maynard filed a false affidavit with the Court, and that Maynard gave perjured testimony during the evidentiary hearing. Doc. 140, pp. 140-147, 151; App. pp. 36-37. The Court further found that the April 4, 1996 document was sent to Maynard's counsel by Maynard's physician in February of 1999, but was not included when

Maynard's counsel forwarded Maynard's medical records to counsel for the Sheriff in response to a discovery request. Doc. 140, pp. 141, 150; App. pp. 39-42.

The trial court imposed sanctions for the discovery violation, including dismissal of Maynard's cause of action and the imposition of monetary sanctions against both Maynard and his counsel. Doc. 140, pp. 146-147, 150; App. pp. 37-38, 41-42. The Court awarded the Sheriff attorney's fees incurred in conjunction with the emergency motion, and also awarded the Sheriff Rule 54 costs of litigation. Doc. 140, p. 147; App. pp. 37-38. The Court also imposed a monetary sanction in the form of a fine to be paid to the court. *Id.* The Court ordered that Maynard and his counsel share equally in the monetary sanctions. Doc. 140, p. 150; App. p. 41.

On March 15, 2002, Maynard and his counsel filed a Notice of Appeal. Doc. 134. On August 19, 2002, the District Court entered its order setting the amount of attorney's fees and costs to be awarded to the Sheriff pursuant to the Court's Rule 37 sanction order. Doc. 161; 164. Maynard and his counsel thereafter filed a Notice of Appeal of the trial court's order regarding fees and costs. Doc. 169.

On June 10, 2003, the Seventh Circuit affirmed in part and reversed in part the decision of the trial court. *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003). The Appellate Court affirmed the trial court's imposition of a $3,500 fine and affirmed the trial court's award of attorney fees caused by the discovery failure, but reversed the trial court's sanction as it applied to Maynard's counsel. *Maynard v. Nygren*, 332 F.3d 462, 470-471 (7th Cir. 2003). The Appellate Court then announced a new standard in the Circuit for the weight

of evidence necessary to support a dismissal as a discovery sanction. The Court ruled that there must be clear and convincing evidence of willfulness, bad faith or fault before dismissing a case. *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003). The Seventh Circuit then remanded the case to the District Court to reconsider the evidence in light of the new standard of proof. *Id.* at 469.

On remand, the District Court applied the elevated "clear and convincing" standard to the evidence going to the willfulness of Maynard's discovery violation. App. p. 6. The Court found, by clear and convincing evidence, that Maynard willfully and in bad faith withheld a document from production during discovery, that Maynard knowingly filed false pleadings, and that Maynard had perjured himself in his affidavit and in his testimony before the District Court. App. pp. 9-10. The Court affirmed its sanction of dismissal, the $3,500 fine, the award of attorney's fees going to the emergency motion, and Defendant's Rule 54 costs. App. p. 18. Plaintiff's second appeal followed.

Maynard did not appeal from the District Court's reaffirmation of the monetary sanctions imposed against him; rather, Maynard challenged the District Court's finding by clear and convincing evidence that Maynard had willfully violated the Court's discovery rules, and also challenged the District Court's sanction of dismissal. App. p. 21. The Appellate Court ruled that the District Judge's finding, by clear and convincing evidence, that Maynard had willfully violated discovery rules was not clearly erroneous. App. p. 23. The Appellate Court also held that three of the factors noted by the District Court in its determination that a lesser sanction than dismissal would not be appropriate, including 1) Maynard's continued untruthfulness,

2) Maynard's failure to pay the monetary sanctions imposed against him, and 3) the evidentiary weakness of Maynard's case, were *all* valid reasons supporting the sanction of dismissal in this case. App. p. 24. The Appellate Court affirmed the ruling of the District Court including the decision to dismiss Maynard's lawsuit. App. p. 25.

Relevant Factual Background

Maynard was employed as a corrections officer at the McHenry County jail from January 9, 1992 to September 15, 1997. Doc. 11: ¶¶ 8, 21. During February of 1996, Maynard was hospitalized twice with incapacitating symptoms; subsequent to his hospitalization, Maynard was diagnosed with multiple sclerosis ("MS"). Doc. 52: Exh. F, p. 10; Doc. 11: ¶11. On March 7, 1996, after being discharged from the hospital, Maynard reported to the Sheriff's Office with a release dated March 4, 1996, from his treating physician, Dr. Martinez. Doc. 11: ¶12; App. p. 77. The March 4, 1996 release stated that Maynard could return to work on March 9, 1996, but that Maynard was still under treatment and could have recurrent episodes of weakness or unsteadiness. Doc. 52: Exh. I. Maynard was denied permission to return to work as a jailer based upon the language of the March 4, 1996 release. Doc. 11: ¶12.

After being denied permission return to duty, Maynard complained to Dr. Martinez about the wording of the March 4, 1996 release, and told the doctor that the language in the release stating that he was subject to "recurrent episodes of weakness and unsteadiness," barred his ability to return to work. Doc. 52: Exh. F, p. 20-22. In response, Dr. Martinez expressed doubt about Maynard's ability to supervise prisoners due to his physical condition, but reminded

Maynard that Maynard was scheduled to see Dr. Nager, a neurologist, later that month. *Id.*; Doc. 140, pp. 63-64. Dr. Martinez told Maynard that although he could not release Maynard to full duty without restrictions, he would defer to Dr. Nager's opinion concerning Maynard's ability to return to work. *Id.* Maynard angrily left the doctor's office, slamming the door. Doc. 140: p. 123.

On March 25, 1996, Maynard went to see Dr. Nager, a neurologist that had treated Maynard during his hospitalization in February of 1996. Doc. 52: Exh. K. Dr. Nager explained to Maynard that Maynard had deficits relating to his MS, and expressed doubts and concerns about Maynard's abilities to safely fulfill his duties as a jailer. *Id.* Dr. Nager repeated these comments in a letter to Dr. Martinez dated March 25, 1996. *Id.*; App. p. 79.

On or about March 28, 1996, Maynard inquired of his supervisor, William Maire, Chief of Corrections, about a medical leave of absence. Doc. 114: Exh. F; SA-4; SA-2, pp. 38-40. Chief Maire told Maynard that a physician's statement was required for a medical leave of absence. *Id.* On March 31, 1996, Maynard submitted to the Sheriff a written request for a medical leave of absence, but did not attach a supporting physician's statement. Doc. 114: Exh. G; SA-2, p. 38-40; SA-4. On April 2, 1996, Chief Maire spoke with Maynard and reminded him that he needed a doctor's statement to support his request for a medical leave of absence; Maynard told Maire he would contact his doctor that day. Doc. 114, Exh. F; SA-4.

Dr. Martinez testified that Maynard thereafter contacted Dr. Martinez and asked him to prepare a release that did not state that Maynard could be subject to recurrent episodes of

weakness or unsteadiness. Doc. 114: Exh. H. Dr. Martinez further testified that in response to Maynard's request, on April 4, 1996, he created another report concerning Maynard; the report was left for Maynard to pick up at the doctor's office. *Id.* Circumstantial evidence established that Maynard picked up the release from Dr. Martinez's office. Doc. 132. Maynard never provided a copy of the April 4, 1996 release to the Sheriff.

Thereafter, Maynard was never able to obtain a release stating that he was able to perform the essential functions of his position. Doc. 52: Exh. H. An independent medical examination of Maynard was conducted in January of 1997 at the request of the Sheriff. Doc. 119: Exh. U. The examination was performed by a neurologist named Dr. Sethi, who concluded in light of Maynard's condition, that Maynard may not be able to perform the essential functions of his job all of the time. Doc. 119: Exh. U; App. pp. 84-87. Nine months after Dr. Sethi's examination and after a total of nineteen months away from the workplace, on September 15, 1997, Maynard's employment as a corrections officer was finally terminated due to Maynard's inability to medically establish that he was able to perform the essential functions of his employment position and that he was fit for duty. Doc. 119: Exh. T.

Maynard filed a Complaint in federal court on June 25, 1998, alleging that the Sheriff violated the Americans with Disabilities Act, 42 U.S.C. § 12101, by not returning Maynard to work as a corrections officer. Doc. 1. The Complaint also alleged that Dr. Martinez had refused to change the wording of the March 4, 1996 release. Doc. 1: ¶17. The Complaint failed to acknowledge the existence of the April 4, 1996 release, in which Dr. Martinez had revised the wording of

the March 4, 1996 release. *Id.* Maynard thereafter amended his complaint, and reiterated his allegation claiming that Dr. Martinez refused to revise the wording of the March 4, 1996 release. Doc. 11: ¶18.

At the close of discovery in the case, the Sheriff filed a Motion for Summary Judgment; the Court granted summary judgment in favor of the Sheriff on Maynard's claim that the Sheriff failed to accommodate him, but denied summary judgment as to Maynard's termination finding there was at least a question of fact whether Plaintiff was qualified. Doc. 54; 71, p. 12. Trial was set for February 11, 2001. Doc. 102.

On January 14, 2002, Dr. David Martinez contacted the Sheriff's counsel concerning the Sheriff's subpoena compelling Dr. Martinez' appearance and production of records at trial; Dr. Martinez explained that he was his own record-keeper. Doc. 114: Exh. H. The conversation between Sheriff's counsel and Dr. Martinez included a discussion of the medical records that would be required for trial, including the release provided by Dr. Martinez to Plaintiff on March 4, 1996. *Id.* During the conversation, Dr. Martinez identified a subsequent report that he had prepared for Maynard on or about April 4, 1996, at Maynard's request. *Id.* Dr. Martinez stated that the original copy of the April 4, 1996 report was given to Maynard, and that a photocopy of the April 4, 1996 record was retained in Maynard's chart. *Id.* Because the Sheriff and his counsel were unaware of the existence of the April 4, 1996 document, counsel requested that Dr. Martinez fax a copy of the April 4, 1996 document to counsel's office. *Id.*

After receiving and reviewing the document, the Sheriff filed an emergency motion seeking involuntary dismissal and sanctions based on the discovery of the previously undisclosed document. Doc. 113; 114. The District Court convened an evidentiary hearing on the Sheriff's motion. Doc. 139; 140. Testimony at the hearing established that Maynard requested and picked up the April 4, 1996 report, but never notified the Sheriff of the existence of the April 4, 1996 report, and never provided a copy of the release to the Sheriff during discovery, despite discovery requests for the production of all medical records. Doc. 140: pp. 143-145.

At the conclusion of the evidentiary hearing, the District Court found that Maynard proffered a false affidavit and gave perjured testimony at the hearing. Doc. 140, pp. 144-147; App. pp. 37-38. The Court further found that Maynard's federal complaint contained false statements; that Maynard failed to provide the April 4, 1996 release despite an explicit discovery request for all medical records; and that Maynard's counsel received the April 4, 1996 release but did not include it with the rest of Maynard's medical records when the medical records were forwarded to the Sheriff. Doc. 140, pp. 140-150; App. pp. 36-42. The Court dismissed Maynard's cause of action, assessed a $3,500 fine for the Court's time, awarded the Sheriff his reasonable attorneys fees and expenses associated with the Emergency Motion, and awarded to the Sheriff his Rule 54 costs. *Id.*

In Plaintiff's first appeal, ("*Maynard I*"), the Seventh Circuit acknowledged the standard from *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) and noted the District Court's authority to apply the sanction of dismissal for Rule 37 violations with a finding of willfulness, bad faith or fault, as long as it first considers

and explains whey lesser sanctions would be inappropriate. App. pp. 48-49. However, in *Maynard I*, the Seventh Circuit also determined as an issue of first impression, what burden of proof is necessary to sustain a Rule 37 dismissal based on willfulness, bad faith, or fault. The Seventh Circuit held that, considering the severe and punitive nature of dismissal as a discovery sanction, a court must have clear and convincing evidence of willfulness, bad faith or fault before dismissing a case. App. p. 49. The Appellate Court remanded the case to the District Court for a re-determination based upon the new and elevated "clear and convincing" evidentiary standard announced in *Maynard I.*

On remand the District Court reconsidered the evidence under a clear and convincing standard. Based upon the evidence, the Court affirmed the dismissal of Maynard's lawsuit as a Rule 37 sanction, affirmed the $3,500 fine imposed for the Court's time, affirmed the award of attorney's fees and expenses associated with the Sheriff's emergency motion, and affirmed the award of the Sheriff's Rule 54 costs. Doc. 140, pp. 140-150. The Court also found, based upon Maynard's testimony at the remand hearing, that Maynard had the ability to pay the sanctions that had been ordered by the Court. SA-1, p. 67; App. pp. 67, 70.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioner suggests that a conflict exists among the Appellate Circuits over the appropriate standard for dismissal of a lawsuit as a sanction under Rule 37. Petitioner fails to cite any case from another Appellate Circuit holding a

contrary standard for dismissal under Rule 37 to that expressed by the Court in *Maynard v. Nygren*, 372 F.3d 890 (7th Cir. 2004). *See also Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003); App. pp. 48-49. Instead, rather than to identify specific conflicting decisions between or among the Appellate Circuits, Maynard merely lists the various factors considered by the courts in deciding whether dismissal was appropriate as a discovery sanction. Then Maynard argues that because the various Appellate Courts did not apply all of the same factors in each case that a conflict somehow exists within the Circuits, however, Maynard fails to identify this alleged conflict.

Additionally, most of the cases from differing Circuits relied upon by Maynard, expressly adopted the "willfulness, bad faith or fault" standard reaffirmed by the Supreme Court in *National Hockey League*, 427 U.S. 639, 640 (1976): *See Anderson v. Foundation for Advancement, Education and Employment of American Indians*, 155 F.3d 500, 504 (4th Cir. 1998); *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002); *Maynard v. Nygren*, 332, F.3d 462 (7th Cir. 2003); *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992).

Furthermore, other Appellate Circuits acknowledge and apply the "willfulness, bad faith or fault" standard. *See Local Union No. 251 v. Town Line Sand & Gravel, Inc.*, 511 F.2d 1198 (1st Cir. 1975); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32 (3d Cir. 1979); *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781 (3d Cir. 1974); *Wilson v. Volkswagon of America, Inc.*, 561 F.2d 494 (4th Cir. 1977); *In Re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation M.D.L. Docket No. 252*, 580 F.2d 819 (5th Cir. 1978); *Savola v. Webster*, 644 F.2d 743 (8th Cir. 1981);

Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977); *Wanderer v. Johnston*, 910 F.2d 652 (9th Cir. 1990); *Shearson Loeb Rhodes, Inc. v. Quinard*, 751 F.2d 1102 (9th Cir. 1985); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538 (10th Cir. 1996); *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538 (11th Cir. 1987); (each applying "willfulness, bad faith or fault" standard.

Because no conflict exists among the Circuits concerning the standard for dismissal of a case as a Rule 37 sanction, the Petition for Writ of Certiorari should be denied on this basis.

A. Dismissal is appropriate to redress willful, bad faith non-compliance

The Supreme Court first provided the standard for dismissal under Rule 37 in *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 1096 (1958). In *Rogers*, the Supreme Court held that Rule 37 authorized dismissal of a complaint because of petitioner's non-compliance with . . . pretrial production . . . , when it has been established that failure to comply was due to willfulness, bad faith, or any fault of the petitioner. *Id.* In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S. Ct. 2778 (1976), the Supreme Court reaffirmed the "willfulness, bad faith or fault" standard previously announced in *Rogers* as the appropriate standard for a Rule 37 dismissal. The standard for dismissal under Rule 37 announced by the Supreme Court in *Rogers* is binding upon all of the Appellate Circuits cited by Petitioner.

B. Sanctions must be determined on an *ad hoc* basis

The choice of an appropriate sanction must be handled on a case-by-case basis, *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003), and the determination of the correct sanction for a discovery violation is a fact-specific inquiry that the district court is best qualified to make. *Ehrenhaus v. Reynolds,* 965 F.2d 916, 920 (10th Cir. 1992). The district court has primary responsibility for selecting the appropriate sanction under the discovery rules and the Court of Appeals will not reverse the district court's selection absent a clear abuse of discretion. *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661 (7th Cir. 1996). Each case cited by Petitioner turns not upon the appropriate standard for dismissal under Rule 37, but rather, on the specific factual circumstances of the case under review.

Clearly the decision to dismiss a case under Rule 37 is a fact-dependent process which calls upon the District Court to review the facts of each case on an *ad hoc* basis. The factual and equitable considerations contemplated by the District Court during an *ad hoc* review do not create a conflict among the Circuits in the standard for dismissal under Rule 37 and therefore the Petition for Writ of Certiorari should be denied on that basis.

II. THE DECISION OF THE SEVENTH CIRCUIT IS NOT AT ODDS WITH *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976)

A. Maynard did more than just withhold a document

Petitioner's entire argument is predicated upon the false premise that his case was dismissed solely on the basis of his failure to disclose a one-page document during discovery. Maynard suggests that his singular failure to disclose one document does not constitute the type of "flagrant bad faith" authorizing dismissal under Rule 37 of the Federal Rules of Civil Procedure, as discussed by the Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). However, Maynard severely understates the conduct that resulted in the dismissal of his case by the District Court.

The District Court's factual finding that Maynard requested and received the April 4 report is significant not only because it establishes that Maynard withheld the document, but it also establishes other instances of Maynard's untruthfulness and his non-compliance with the Federal Rules of Civil Procedure. The conduct that ultimately resulted in the dismissal of Maynard's lawsuit included:

(1) Maynard's filing of a false pleading in his original complaint stating that his doctor would not change the wording of the March 4 release, when in fact his doctor did change the wording of the release in the April 4 report.

(2) Maynard's repeating of the false statement in his amended complaint. App. p. 9.

(3) Maynard's failure to disclose the April 4 report at the initiation of his litigation pursuant to Rule 26;

(4) Maynard's failure to disclose the April 4 report despite an explicit discovery request for all medical records; App. p. 36.

(5) Maynard's filing of a perjured affidavit, attesting to the fact that he had never requested or received the withheld document; App. pp. 10, 12, 37.

(6) Maynard's perjured testimony before the District Court during the hearing on the Sheriff's motion for sanctions under Rule 37. App. pp. 10, 12, 37.

The discovery of the April 4 report "opened Pandora's box" to even more instances of Maynard's misconduct throughout the litigation. Based upon his false pleadings, perjured testimony, and willful and continuous violation of discovery, the District Court dismissed his case with prejudice as a sanction under Rule 37. The District Court summarized Maynard's cumulative conduct as "contumacious continuous behavior." App. p. 9.

B. Maynard continued to lie

Moreover, Maynard continued to lie. Maynard not only denied receiving the April 4 document, he denied ever requesting the document. If the Court was to believe Maynard's testimony that he never requested the document, the Court would have to disbelieve Dr. Martinez' testimony that Maynard requested the document, disbelieve Jeanne Gannon's testimony that she typed the letter for Dr. Martinez and put it out for Maynard to pick up, disbelieve Cynthia

Kroncke's testimony that she subsequently copied and mailed the document to Maynard's counsel, and disbelieve Chief Maire's testimony that he had several discussions with Maynard concerning Maynard's request for a medical leave of absence and Maynard's simultaneous need to obtain a report from his physician. Doc. 140.

Based upon the all of the evidence, the District Court quite properly found that Maynard lied about requesting the April 4th letter from Dr. Martinez, and found further that Maynard had requested it as urgent. App. p. 34. The Court found that Maynard had motive to request the release, that he wanted to work and wanted the April 4 letter to release him. App. p. 34. The Court also found that the April 4 letter was picked up by Maynard, contrary to Maynard's testimony. App. pp. 34-35. The Court determined that Maynard gave untruthful testimony under oath in his affidavit and in his testimony when he testified that he did not request or receive the release from Dr. Martinez. App. pp. 9, 37. The Court also determined that Maynard had been untruthful in his pleadings by filing a false amended complaint. App. p. 9.

These findings support the Court's conclusion that the totality of Maynard's conduct merited dismissal of his lawsuit as a sanction, particularly in light of the prejudice to the defendant.

C. Maynard's misconduct resulted in prejudice to the Defendant

The District Court made express findings concerning the prejudice to the defendant as a result of the plaintiff's misconduct. The Court found that it was prejudicial to the defendant that the defendant only became aware of the

plaintiff's discovery violation shortly before trial. App. pp. 12, 36. The Court noted also that defendant's knowledge of the discovery violation came from a potential witness, not from the plaintiff. App. p. 36. The Court also concluded that the discovery violation was willful and in bad faith on the part of the plaintiff, further prejudicing defendant. App. pp. 36-37. Additionally, plaintiff's untruthful testimony under oath in his affidavit and in his testimony prejudiced defendant by denying defendant due process. App. p. 37. Moreover, the District Court found that plaintiff's failure to pay prior ordered sanctions also resulted in prejudice to the defendant, App. p. 7, particularly "since the defendant will never recover the monies spent preparing the case for trial," the Court opined. App. p. 12.

The substantial prejudice to the defendant was a proper factor for the Court to consider in dismissing Maynard's lawsuit as a Rule 37 sanction for Maynard's intentional, willful, and bad faith violation of discovery.

D. The April 4th document is relevant

Maynard argues that the April 4, 1996 report was not relevant because the Sheriff didn't terminate Maynard until September 15, 1997, and the Sheriff did so then in reliance upon the report from Dr. Sethi. However, to accept this argument would be to give Maynard the benefit of his deception. Maynard cannot be allowed to argue that the document he intentionally failed to disclose during discovery was too remote in time to the date Maynard was ultimately terminated to be relevant. Certainly the Sheriff would have acted earlier had Maynard been forthcoming and disclosed the information he had received from his physician.

The District Court cogently realized that the April 4 report was highly relevant to summary judgment and at trial. App. p. 33. The Court found that the document was relevant to plaintiff's condition in March and April of 1996. App. p. 33. It found that the document was very relevant to plaintiff's ability to work and would directly bear on this adversely for the plaintiff. App. p. 33. The Court also noted that if the report had not been produced [by Dr. Martinez] defendant would not have had it to use at trial. App. p. 33. The Court also found that the withheld document would also have been important in taking Dr. Martinez's deposition, however, it was not available at that time because of the discovery violation. App. p. 33. Additionally, the Court held that the April 4th document was important for the summary judgment motion and could also have impacted the Court's ruling on summary judgment. App. p. 33. The Court noted that the April 4th report might also have affected the ambiguous opinion of the County's independent examining physician had he known of the report. App. p. 33. Finally, the Court found that the report was necessary for cross-examination over opinions rendered in the absence of disclosure of the report. App. p. 34.

Because the document was highly relevant during discovery and at trial, Plaintiff's intentional, willful and bad faith nondisclosure of the document merits dismissal of his lawsuit as a Rule 37 sanction. App. pp. 145-146.

E. The sanction of dismissal is necessary to deter similar misconduct

In *National Hockey League*, 427 U.S. 639, 643 (1976), the Supreme Court held that the most severe of sanctions provided by statute or rule must be available to the district

court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. *See also Roadway Exp., Inc. v. Piper*, 447 U.S. 752 (1980). Maynard filed false pleadings, withheld evidence and committed perjury in his affidavit and in his testimony. Under those circumstances, the sanction of dismissal was appropriate not only to penalize Maynard for his misconduct, but also to deter others from following Maynard's example.

Maynard's conduct far exceeded that of merely failing to disclose one document during discovery. Maynard's conduct amounted to willful bad faith. App. p. 37. Maynard's failure to produce the document was intentional and his withholding the document from requested discovery was willful. App. p. 36. In light the District Court's finding of "contumacious continuous behavior" by Maynard, the Court's imposition of dismissal as a Rule 37 sanction is also an important measure to deter other litigants from likewise committing fraud upon the Court. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The ADA requires employers to reasonably accommodate the known disabilities of employees who are qualified individuals with a disability. A qualified individual with a disability is an individual with a disability recognized under the ADA, who can perform the essential functions of the employment position, with or without a reasonable accommodation. 42 U.S.C. § 12111(8); App. p. 66. Maynard withheld a medical record that expressly stated that he was unable to perform the duties of his position because of his condition and that he was currently unable to work. App. p. 78. Maynard withheld evidence that would have established that he was not a qualified individual with a disability in April of 1996, a time when his leave benefits were fully exhausted and his continued inability to work would have resulted in the termination of his employment. Had the Court been aware of the April 4, 1996 report, it would have been determined that Maynard was not a qualified individual with a disability because he was unable to perform the essential functions of his employment with or without an accommodation. App. p. 14.

Maynard's withholding of evidence was compounded by his filing of false pleadings and his perjured testimony in his affidavit and before the District Court. The totality of Maynard's misconduct spans far beyond the intentional failure to disclose a single document, bringing his conduct well into the range of a fraud upon the Court. This in turn wholly deflates Petitioner's suggestion that Maynard's conduct did not rise to the level of willfulness and bad faith as contemplated by the Court in *National Hockey League*, 427 U.S. 639 (1976) and *Rogers*, 357 U.S. 197 (1958).

Respondent has not uncovered one case in any Appellate Circuit where the court has held that filing false pleadings, withholding evidence and repeated perjury did not constitute a sufficient basis for the dismissal of a lawsuit as a Rule 37 sanction. On the contrary, all of the Circuits appear to give proper deference to the "willfulness, bad faith or fault" standard announced by the Supreme Court. Consequently, no conflict exists among the Circuits regarding the proper standard for dismissal under Rule 37.

Because no conflict exists among the Appellate Circuits and because the Seventh Circuit's opinion herein comports to the standards announced in *Rogers*, *supra*, the Petition for Writ of Certiorari should be denied.

WHEREFORE, for the foregoing reasons, Respondent, Sheriff Keith Nygren respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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